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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
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Draft instrument against illegal trafficking in and transporting of migrants

Revised draft Protocol against the Smuggling[1] of Migrants by Land, Air and Sea,[2] supplementing the United Nations Convention against Transnational Organized Crime[3,4]

[1] The term "smuggling" is used throughout the text in the light of action taken by the General Assembly at its fifty-fourth session on the recommendation of the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council. During the discussion at the first session of the Ad Hoc Committee, several delegations raised the issue of the translation of the term "smuggling" into languages other than English and the problems that it created. Attention will, therefore, be paid to identifying the appropriate term to be used in languages other than English. That will be done in the glossary of terms that the Secretariat is currently preparing. Existing texts on the subject, such as General Assembly resolutions 48/102 of 20 December 1993 and 51/62 of 12 December 1996 and Economic and Social Council resolution 1995/10 of 24 July 1995, might be useful in this regard. The Ad Hoc Committee will reconsider this matter at a future session. When agreement is reached on the wording of the title, the terminology will be adjusted in provisions throughout the text, as necessary.

[2] In its resolution 53/111 of 9 December 1999, the General Assembly requested the Ad Hoc Committee to discuss the elaboration of an international instrument addressing illegal trafficking in and transporting of migrants, including by sea. The Ad Hoc Committee at its first session was of the view that focusing on illegal trafficking and transporting by sea would be too restrictive.

[3] The text of the draft Protocol is based on the original proposal of Austria and Italy (A/AC.254/4/Add.1), with subsequent modifications as noted.

[4] At the sixth session of the Ad Hoc Committee, it was noted during the deliberations on the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the "Trafficking in Persons Protocol") that the words "each State Party" and "States Parties" were used interchangeably in the text. The Committee decided to adopt the term "States Parties" throughout the text. For consistency, the same change has been made here, where possible.

V.00-52390 (E)

Preamble[5]

The States Parties to this Protocol,

[(a) *Taking note* of the United Nations Convention against Transnational Organized Crime,]

(b) *Concerned* about the rapid development of the smuggling of migrants,

[(c) *Alarmed* by the significant increase in the activities of transnational criminal organizations that make illicit profits by smuggling migrants across national boundaries,]

[(d) *Recognizing* that transnational criminal organizations also use the smuggling of migrants to further numerous other criminal activities, thus bringing great harm to the States concerned,]

(e) *Concerned* that the smuggling of migrants may lead to the misuse of established procedures for immigration, including those for seeking asylum,[6]

[(f) *Also concerned* that the smuggling of migrants can endanger the lives or security of the individual migrants involved and entails great expense for the international community, including the costs of rescue, medical care, food, housing and transportation,]

[(g) *Reaffirming* that States should give high priority to preventing, combating and eradicating the smuggling of migrants because of the links of such activity with transnational organized crime and other criminal activities,]

[(h) *Convinced* that combating the smuggling of migrants requires international cooperation, the exchange of information and other appropriate measures at the national, regional and global levels,]

(i) *Also convinced* that, to counter this phenomenon, a global approach, including socio-economic measures, is necessary,

(j) *Further convinced* of the need to provide migrants with humane treatment and full protection of their human rights,

(k) *Convinced* of the need for a comprehensive international legal instrument to combat all aspects of the transnational smuggling of migrants by land, sea and air,

(l) *Stressing* the importance of full compliance by States with their obligations under the provisions of the 1951 Convention[7] and the 1967 Protocol relating to the Status of Refugees,[8] and affirming that this Protocol does not affect the protection afforded under the terms of the 1951 Convention and the 1967 Protocol and other provisions of international law,

(m) *Recalling* the work of the International Maritime Organization concerning unsafe practices associated with trafficking in or transporting of illegal migrants by sea, in particular the work of the Maritime Safety Committee, which approved the interim

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[5] Several delegations were of the view that the preamble should contain provisions to address the underlying causes of the illegal movement of people and to reaffirm the principle of free movement of people. Most delegations were of the view that it would be most useful to consider the preamble after the finalization of the text of the substantive articles.

[6] Several delegations were of the view that the question of refugees should also be addressed.

[7] United Nations, *Treaty Series*, vol. 189, No. 2545.

[8] Ibid., vol. 606, No. 8791.

measures for combating unsafe practices associated with the trafficking or transport of migrants by sea,[9]

(n) [*Text on decisions of the International Civil Aviation Organization to be added*],

[(o) *Reaffirming* respect for the sovereignty and territorial integrity of all States, including their right to control immigration flows,]

(p) *Desiring* to supplement the United Nations Convention against Transnational Organized Crime by a protocol directed specifically against the smuggling of migrants, as a first step towards the eradication of this crime,[10]

[(q) *Declaring* that such an instrument must concentrate on crime prevention and criminal justice, in particular the activities of those who organize and facilitate the smuggling of migrants,]

Have agreed as follows:

I. General provisions relating to the smuggling of migrants by land, sea and air

Option 1

Article 1
Relation to the United Nations Convention against Transnational Organized Crime

This Protocol supplements the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], and, as regards the States Parties to this Protocol, those two instruments shall be read and interpreted together as one single instrument.[11]

[9] One delegation suggested that the International Maritime Organization (IMO) circular containing the interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea (MSC/Circ.896) could be a useful source of inspiration, but that the drafting of the text of the present instrument should not necessarily be conditioned by that circular.

[10] One delegation suggested that the preamble should be supplemented with provisions stressing the effects of illegal trafficking or smuggling on national security, as well as the need to strengthen cooperation and coordination between States.

[11] For the discussion on the relationship between the draft Convention and the international instruments whose drafting has been entrusted to the Ad Hoc Committee pursuant to General Assembly resolutions 53/111 and 53/114 of 9 December 1998, see also the report of the Ad Hoc Committee on its first session (A/AC.254/9). At the fourth session of the Ad Hoc Committee, some delegations expressed their preference for option 1 over option 2, while other delegations were of the view that it was too early to decide which option to choose. One delegation suggested that the principle of *mutatis mutandis* application, as reflected in option 2, should be included in the text of option 1. Another delegation suggested that the article should be moved to the chapter on final provisions. During a brief discussion at the eighth session of the Ad Hoc Committee, one delegation proposed that the Secretariat be asked to prepare a combined text for possible use in all three draft Protocols. Further discussion was deferred.

Option 2

Article 1
Application of the United Nations Convention against Transnational Organized Crime

The provisions of articles [...] of the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], shall also apply *mutatis mutandis* to this Protocol.

Article 2[12]
Definitions

For the purposes of this Protocol, the following definitions shall apply:

(a) "Smuggling of migrants" shall mean the procurement of the illegal entry into or illegal residence of a person in [a] [any] State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit;[13]

(b) "Illegal entry" shall mean the crossing of borders without complying with the necessary requirements for legal entry into the receiving State;[14]

(c) "Illegal residence" shall mean remaining in the territory of a State without complying with the necessary requirements for legally remaining in the State concerned;[15]

[*Old subparagraph (d) has been deleted.*][16]

[12] The articles on definitions (article 2) and purposes (article 3) will need to be reviewed in the light of choices made with regard to options that appear later in the text. In addition, those articles will need to be reviewed to ensure their consistency with the draft Convention.

[13] At the eighth session of the Ad Hoc Committee, new text was adopted for this provision, based on the proposal of Austria and Italy (A/AC.254/L.179). There was agreement that wording that included reference to direct and indirect benefits was preferable to the word "profit", but some delegations reserved their positions on the use of the words "in any State Party" pending further consultations. Several delegations expressed concern that the Protocol should focus on illegal entry rather than on illegal residence and preferred the text proposed by Mexico. Discussion on the question continued and the Chairperson indicated that, in her view, there was still room to take those concerns into account in the text. The delegation of Mexico concurred in this, but reiterated that the scope of the Protocol and the extent to which it would deal with illegal residence were matters of serious concern to it and not just questions of terminology. Several delegations expressed interest, but reserved comment on Mexico's proposal pending translation. The proposal of Mexico read as follows:

> "'Smuggling of migrants' shall mean the procurement of irregular entry with the purpose of permitting the illegal stay or illegal residence in a State Party of which the person is not a national, a temporary visitor or a permanent resident in order to obtain[, directly or indirectly, a financial or other material benefit] [a profit]."

[14] During the eighth session of the Ad Hoc Committee, the delegation of Mexico proposed the use of the words "irregular entry" instead of "illegal entry", but it was decided to retain the existing text.

[15] New text for this provision was agreed at the eighth session of the Ad Hoc Committee on the basis of text prepared by an informal working group (A/AC.254/L.180).

[16] At the eighth session of the Ad Hoc Committee, subparagraph (d) of this article was deleted following the insertion of new text into subparagraph (a). That text replaced the word "profit" with a reference to financial and other benefits based on subparagraph (a) of article 2 *bis* of the draft Convention (see A/AC.254/L.179). A few delegations preferred the greater certainty of expressly defining "profit" in the draft Protocol.

(d) "Fraudulent travel or identity document" shall mean any travel or identity document:[17]

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State;[18] or

(ii) That has been improperly issued or obtained through misrepresentation, corruption, duress or any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;[19]

(e) "Vehicle" shall mean any conveyance that may be used for transportation by land or air; and[20]

(f) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.[21]

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[17] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested either deleting this subparagraph or moving it to article 4, while other delegations were in favour of retaining it. At the eighth session, one delegation suggested adding the words "used for international travel" at the end of this subparagraph. Most delegations were concerned that this would be too restrictive, as purely domestic documents frequently played a role in migrant smuggling.

[18] At the eighth session of the Ad Hoc Committee, there was lengthy discussion about the meaning of the words "falsified", "falsely made" and "altered". The intention was to deal with the acts of unauthorized persons and it was decided to use the words "falsely made or altered". It was agreed that this included not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents.

[19] At the eighth session of the Ad Hoc Committee, many delegations felt that the text of subparagraphs (d) (ii) and (iii) of article 2 should be dealt with under the provisions of article 4 that criminalize the misuse of documents. Some delegations pointed out that these subparagraphs were intended to define as "fraudulent" a document that was being misused, even if the document itself was genuine.

[20] At the eighth session of the Ad Hoc Committee, discussion continued on the question of whether it was appropriate to define aircraft as a type of vehicle. Some delegations proposed to define "aircraft" separately. Most delegations would be satisfied with either one or two definitions, provided that the articles that at present referred to vehicles, namely, articles 9 (Additional legislative and administrative measures), 11 (Prevention) and 14 (Training), included aircraft, if these were defined separately. It was decided to retain the existing text pending a review of those articles. The delegation of China pointed out that the definition of "vessel" in the draft Protocol and the International Civil Aviation Organization's definition of "aircraft" both excluded police and military vessels or aircraft and suggested that a similar exclusion should be applied to vehicles and aircraft in the draft Protocol.

[21] The source of the definition of "vessel" is the definition of "ship" provided in paragraph 2 of the IMO interim measures (MSC/Circ.896, annex). At the eighth session of the Ad Hoc Committee, there were proposals to replace the word "vessel" with the word "ship" and to exclude vessels without propulsion, but it was decided to retain the text as it was.

[*Paragraph 2 has been deleted.*][22]

Article 3
Purposes

The purposes of this Protocol are:[23]

(a) To prevent, investigate and prosecute the smuggling of migrants, when involving an organized criminal group, as defined in the Convention; and

(b) To promote and facilitate cooperation among States Parties to meet these objectives; [and,

(c) To promote international cooperation in the interests of the protection of the victims of such trafficking and respect for their human rights.][24]

Article 3 bis
Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been smuggled.[25]

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[22] Paragraph 2 was deleted at the eighth session of the Ad Hoc Committee (see A/AC.254/4/Add.1/Rev.4, footnote 33). Some delegations felt that the substance of the paragraph should be dealt with, if at all, in article 6. Others noted that the need for a requirement that States Parties treat illegal entry or residence involving other States in the same way as illegal entry or residence involving their own territories depended in part on whether the words "in any State Party" or "in a State Party" were included in article 2, paragraph 1 (a). See also the footnote to that provision (footnote 13).

[23] The informal consultations held during the fifth session of the Ad Hoc Committee recommended replacement of the words "when committed in the context of transnational organized crime" with the words "when involving an organized criminal group". At the eighth session, it was decided to replace the text with a proposal made by France and the United States of America (A/AC.254/L.178), as amended by the United States during the discussions. That text now forms subparagraphs (a) and (b) of article 3. Some delegations again expressed concern that the reference to smuggling "involving" an organized criminal group was too broad and preferred the words "when committed by". Some delegations also expressed concern that including the reference to an "organized criminal group" might result in an overly restrictive interpretation of the scope of the Protocol. One delegation proposed that the order of the paragraphs be changed to match that of article 3 of the draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. The present order is more consistent with the draft Trafficking in Persons Protocol, however, which has more similar content, and it was therefore decided to maintain the order originally proposed.

[24] At the eighth session of the Ad Hoc Committee, there was extensive discussion of the need to incorporate text referring to the protection of victims or migrants. Most delegations supported this in principle. Many preferred placing the text in article 3, but a substantial number argued that it should be included elsewhere instead. For purposes of further discussion, it was decided to incorporate the text of article 1, paragraph 2, of the proposed alternative text for the draft Protocol submitted by Mexico at the sixth session (A/AC.254/L.96). It was also decided that the text should be placed in brackets pending further discussion. One delegation proposed that, if this text were to be used, the words "victims of such trafficking" should be replaced with the words "smuggled migrants" for greater consistency with the substance of the draft Protocol.

[25] New text for this provision was produced by a working group at the eighth session of the Ad Hoc Committee (A/AC.254/L.193). The Committee noted that the placement of the text in the draft Protocol might have to be reviewed later. The delegation of Mexico noted that the question of whether or how article 4 of the draft Protocol would apply to persons who smuggled only migrants who were relatives or members of their immediate families was still not addressed in the text. See paragraph 3 of the article on implementation measures proposed by Mexico (A/AC.254/L.160), and A/AC.254/L.193, footnote 1.

Article 4
Criminalization

1. States Parties that do not already have in their domestic law offences covering the conduct described in this paragraph shall adopt the necessary legislation or other measures to establish as criminal offences when committed intentionally [and when involving an organized criminal group]:[26]

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document.[27, 28]

[*The text proposed for paragraph 2 has been deleted.*][29]

2. Each State Party shall also adopt the necessary legislation or other measures to establish as a criminal offence the following conduct:[30]

(a) Attempting to commit an offence set forth in paragraph 1 of this article;[31]

(b) Participating as an accomplice[32] in an offence set forth in paragraph 1 of this article;[33]

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[26] Discussions continue with respect to the question of whether the Protocol should apply to offences that "involve" an organized criminal group in some general way or only to offences actually "committed by" such a group. During the eighth session of the Ad Hoc Committee, a majority of delegations favoured the broader language "when involving" and felt that consistent language should be used throughout the Protocol on this question. See the notes to article 5 below for details.

[27] The text of this provision was produced by an informal working group set up during the eighth session of the Ad Hoc Committee (see A/AC.254/L.173). It replaced both of the options contained in document A/AC.254/4/Add.1/Rev.4. One delegation expressed concern that this provision might include offences of simple possession of illicit documents, a matter for domestic law. It was pointed out in response that the offence of possession under subparagraph (b) (ii) would only apply where the possession in question was for the purpose of smuggling migrants as set out in subparagraph (a). Several delegations requested that this view be recorded in the *travaux préparatoires*.

[28] At the eighth session of the Ad Hoc Committee, one delegation suggested that violation of human rights should be established as a crime under this article, a suggestion that was opposed by several delegations on the ground that it was already covered under paragraph 5.

[29] At the eighth session of the Ad Hoc Committee, option 1, which had contained a proposed paragraph 2, was excluded from further consideration.

[30] At the eighth session of the Ad Hoc Committee, there was agreement in principle that the text of this article should correspond to parallel text in the draft Convention. It was decided to defer further discussion pending completion of that text.

[31] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested combining subparagraphs 3 (a), (b) and (c).

[32] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "as an accomplice". At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation opposed the deletion of those words.

[33] Some delegations were of the view that, notwithstanding paragraph 6 of this article (now deleted), the concept of participation required clarification.

(c) Organizing or directing others to commit an offence set forth in paragraph 1 of this article;[34] or

[(d) In any other way contributing to the commission of an offence set forth in this article by a group of persons acting with a common purpose; such contribution shall be intentional and shall either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.]

3. States Parties shall make the commission of the offences in this article liable to sanctions that take into account the grave nature of the offences.

[*Option 1 of paragraphs 5 and 6 has been deleted.*][35]

4. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as aggravating circumstances to the offence of the smuggling of migrants circumstances:[36]

(a) That endanger, or are likely to endanger, the life or safety of persons whose illegal entry is procured or intended; or

(b) That entail [exploitation or][37] inhuman or degrading treatment[38] of such persons.[39]

5. Nothing in this Protocol shall prevent States Parties from taking measures against a person whose conduct constitutes an offence under their domestic law.[40]

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[34] At the fourth session of the Ad Hoc Committee, some delegations suggested inserting the words "or attempting to commit such an offence" after the word "article" and deleting subparagraph (a).

[35] At the eighth session of the Ad Hoc Committee, it was decided to exclude former option 1 of paragraphs 5 and 6 from further discussion. As a consequence, the following paragraph, proposed at that session as new paragraph 7 *bis*, has been renumbered paragraph 5.

[36] At the eighth session of the Ad Hoc Committee, proposals from the delegations of Australia and Colombia for this provision were discussed at length. The major issue was whether the circumstances listed would be aggravating factors for all offences under the Protocol or only for the principal offence of smuggling migrants. The text eventually agreed to is based on the second, narrower approach and compromise drafting.

[37] This proposal was made by the delegation of Colombia at the eighth session of the Ad Hoc Committee. There was no consensus about whether these words should be added or not and it was decided to place them in brackets for further consideration. Some delegations felt that this language would provide better protection for migrants, while others felt that all possible cases of exploitation would be dealt with by the proposed Trafficking in Persons Protocol and that the content of that instrument should not be duplicated here.

[38] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested inserting the words "and smuggling of" after the word "treatment", while other delegations opposed the insertion of those words.

[39] At the fourth session of the Ad Hoc Committee, Austria suggested including this wording as an option in the main body of the text, in order to combine paragraphs 5 and 6 of this article (now deleted). At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested that the element of "exploitation" in option 1 should be included in option 2.

[40] The text of this paragraph was proposed as new paragraph 7 *bis* by a working group set up during the eighth session of the Ad Hoc Committee (see A/AC.254/L.193) and was adopted at that session for purposes of further discussion.

Article 5
Scope of application

[Except as otherwise provided,] this Protocol applies to offences established under this Protocol [that involve] [that are committed by][41] an organized criminal group as defined in the Convention.[42]

[*Paragraph 2 has been deleted and replaced with a new article 15 bis.*]

Article 6
Jurisdiction[43]

1. Each State Party shall take legislative measures to establish its jurisdiction over the offences mentioned in article 4 of this Protocol in accordance with article 9 of the Convention.

2. If more than one State Party intends to assume jurisdiction over an alleged offender in accordance with paragraph 1 of this article and with article 9 of the Convention, the States Parties concerned shall consult each other with a view to renouncing jurisdiction in order to render possible proceedings in the territory of the State Party most directly affected by the commission of the smuggling of migrants.[44]

[41] The major outstanding issue with respect to the application of the Protocol remains the question of whether it would apply only to cases where an offence has actually been committed by an "organized criminal group" or to cases where there is some less direct involvement as well. The Chairman pointed out that it would be necessary to resolve this at the next session and asked delegations to take the matter up with their Governments in the interim. A majority of delegations that spoke on this point supported the words "that involve". In their view, the Protocol should have a relatively broad application. Many pointed out that when States Parties sought to apply the Protocol in specific cases, they would be seeking assistance with an ongoing investigation. At such times, it might not be known whether organized crime was involved or it might be impossible to meet any basic standard of proof as a prerequisite to obtaining assistance under the Protocol. Those who preferred the words "when committed by" felt that the Protocol should apply to a narrower range of cases. A large majority of the delegations speaking on both sides of the issue pointed out that the same question arose in other articles, in particular article 4, and indicated that, once the problem was resolved, the same rule and the same language should be used in other articles to make them consistent.

[42] The new text of this paragraph is based on a compromise text submitted by the delegations of Mexico and the United States at the eighth session of the Ad Hoc Committee. The words "Except as otherwise provided" were proposed to allow some flexibility to extend the application of the Protocol further with respect to specific articles should this prove necessary. Some delegations had concerns about this and it was decided to bracket the text pending an assessment, as other articles were reviewed, as to whether it would actually be necessary. The delegation of Germany noted that this provision might not be needed at all, if the nature of the required link to offences committed by transnational organized crime groups was clarified in articles 3 and 4. Several delegations also expressed concerns about circularity in the language, which had the Protocol apply to offences established by the Protocol.

[43] It is understood that the provisions on extradition, mutual legal assistance and other forms of international cooperation in criminal matters that would appear in the Convention would apply to the Protocol. In addition, it is understood that any provisions relating to human rights of detainees should be contained in the Convention. However, there is a need to review the question of whether any additional provisions would be necessary in view of the specific nature of the Protocol.

[44] Some delegations were of the view that this paragraph should be made consistent with article 9 of the draft Convention.

II. Smuggling[45] of migrants by sea[46]

Article 7
Cooperation and mutual assistance

1. States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in conformity with international law.[47, 48]

2. A State Party that has reasonable grounds to suspect that a vessel, which is flying its flag or claiming its registry, which is without nationality or which, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned, is engaged in the smuggling of migrants by sea may request the assistance of other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance within the means available to them.[49, 50]

Article 7 bis
Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State Party is engaged in the smuggling of migrants may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel.[51] The flag State may authorize the requesting State, *inter alia*:

[45] Concerns about the use of the term "smuggling" are discussed in the footnote to the word in the title of the draft Protocol (footnote 1).

[46] In the version of the draft Protocol contained in document A/AC.254/4/Add.1/Rev.2, this chapter included only one article (article 7). For the sake of clarity, the delegations of Austria and Italy proposed the structure followed in the present version. At the eighth session of the Ad Hoc Committee, time did not permit discussion of chapter II. It was noted that, unlike other elements of the draft Protocols to the draft Convention, these articles required the participation of delegates with specific expertise in maritime law. In order to facilitate their attendance, it was decided that these articles would be reviewed at the beginning of the next session of the Ad Hoc Committee at which the revised draft Protocol against the Smuggling of Migrants by Land, Air and Sea was scheduled for consideration.

[47] The language of this provision is derived from article 17, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the "1988 Convention") and from paragraph 8 of the IMO interim measures.

[48] At the sixth session of the Ad Hoc Committee, a specific reference to the United Nations Convention on the Law of the Sea and other international instruments was deleted at this point. There was general agreement that the reference should include both customary and conventional international law and not just specific instruments to which not all States were parties. Some delegations expressed concern about this and wanted the words "and in particular the United Nations Convention on the Law of the Sea" added after the reference to international law.

[49] The language of this provision is derived from article 17, paragraph 2, of the 1988 Convention and from paragraph 11 of the IMO interim measures. During the sixth session of the Ad Hoc Committee, it was decided to replace the words "as is reasonable under the circumstances" with the words "within the means available to them", to bring the language closer to article 17, paragraph 2, of the 1988 Convention.

[50] At the sixth session of the Ad Hoc Committee, some delegations proposed moving this provision from article 7 to article 7 *bis*. Discussion on this question was deferred pending final determination of the content of the articles.

[51] The language of this provision is derived from article 17, paragraph 3, of the 1988 Convention.

(a) To board the vessel;[52]

(b) To inspect the vessel; and

(c) If evidence is found that the vessel is engaged in the smuggling of migrants, to take appropriate action with respect to the vessel, persons and cargo[53] on board, as [expressly][54] authorized by the flag State [in accordance with article 7 *ter* of this Protocol].[55, 56]

2. A State Party that has taken any action in accordance with paragraph 1 of this article shall promptly inform the flag State concerned of the results of that action.[57]

3. A State Party shall respond expeditiously to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made pursuant to paragraph 1 of this article.[58]

4. A flag State may, consistent with article 7, paragraph 1, of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken [, including the use of force].[59] A State Party shall take no additional actions without the express authorization of the flag State, except those necessary to relieve imminent danger [to the lives or safety of persons][60] or those which follow from relevant bilateral or multilateral agreements.[61]

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[52] At the sixth session of the Ad Hoc Committee, several delegations expressed concern about the exact meaning of the word "board" and its translation into other languages. At issue was the extent to which use of the term would authorize the boarding of a vessel against the will of the person in charge of it. The word "board" appears in both the 1988 Convention and the IMO interim measures.

[53] At the sixth session of the Ad Hoc Committee, several delegations expressed concern about the reference to "persons and cargo" in this context.

[54] At the sixth session of the Ad Hoc Committee, several delegations proposed that the word "explicitly" or the word "expressly" be added at this point for greater clarity. Other delegations expressed reservations about the possible effect on domestic law.

[55] Compromise text proposed by the Chairperson at the sixth session of the Ad Hoc Committee in response to the proposal of a number of delegations that a cross-reference to the safeguard provisions of article 7 *ter*, paragraph 3 (a), be added to this article.

[56] The language of this provision is derived from article 17, paragraph 4, of the 1988 Convention.

[57] The language of this provision is derived from article 17, paragraph 8, of the 1988 Convention and from paragraph 12 of the IMO interim measures.

[58] The language of this provision is derived from article 17, paragraph 7, of the 1988 Convention and from paragraph 14 of the IMO interim measures.

[59] The language of this provision is derived from article 17, paragraph 6, of the 1988 Convention. At the sixth session of the Ad Hoc Committee, a number of delegations expressed concern that the reference to "the use of force" in this provision might serve as an authorization or encouragement to use force. Those delegations wanted the reference deleted. Other delegations expressed the view that the actual effect was to limit the use of force, by ensuring that this could only occur where authorized by the State whose flag the ship was entitled to fly or in which it was registered, and wanted the phrase retained. Several possible alternative texts were considered, but none found sufficient consensus.

[60] At the sixth session of the Ad Hoc Committee, many delegations expressed the view that the words "imminent danger" were too broad and required clarification. Some delegations sought clarification that the danger referred to was "to life". Others expressed a preference for limiting this provision to cases where there was danger to the lives of migrants. Others pointed out that cases could arise where the lives of crew members or boarding parties exercising their powers under paragraph 1 (a) might be endangered and that the wording should provide for this.

[61] The language of this provision is derived from paragraph 13 of the IMO interim measures. Some delegations expressed concern that the exceptions did not cover all the operational scenarios that might arise.

5. States Parties shall designate an authority or, where necessary, authorities:[62]

(a) To receive information on the smuggling of migrants mentioned in paragraph 3 of this article;[63] and

(b) To receive and respond as quickly as possible to requests for assistance, confirmation of registry or of the right of a vessel to fly their flags and authorization to take appropriate measures.[64, 65]

6. When there are reasonable grounds[66] to suspect that a vessel is engaged in the smuggling of migrants by sea and it is concluded in accordance with the law of the sea that the vessel is without nationality or has been assimilated to a vessel without nationality, States Parties shall board and inspect[67] the vessel, as necessary. If evidence of involvement in the smuggling of migrants is found during such inspection,[68] States Parties shall take appropriate measures in accordance with relevant domestic and international law.[69, 70]

Article 7 ter
Safeguard clauses

1. When there is evidence that a vessel is engaged in the smuggling of migrants and a State Party takes action in accordance with this Protocol[71] and relevant domestic and international law, that State Party shall ensure the safety and the humane treatment of the

[62] This text was revised at the sixth session of the Ad Hoc Committee to address the concerns of some delegations that two separate authorities might be needed. The delegation of Spain proposed that the words "an authority, or where necessary, authorities" be replaced with the words "a central authority, or where necessary, central authorities". This question will be addressed at a later date, in conjunction with discussions on the articles of the draft Convention that deal with central authorities and similar matters.

[63] At the sixth session of the Ad Hoc Committee, some delegations expressed the view that this provision should be moved to article 10 (Information). Its current placement was agreed to pending future discussions.

[64] The language of this provision is derived from article 17, paragraph 7, of the 1988 Convention and from paragraph 21 of the IMO interim measures. At the sixth session of the Ad Hoc Committee, it was noted that the substance of this provision overlapped that of article 14, paragraph 8 (on appointment of central authorities for mutual legal assistance), of the draft Convention and should therefore be re-examined once that provision had been finalized.

[65] At the sixth session of the Ad Hoc Committee, the words "as quickly as possible" were added at the request of several delegations.

[66] At the sixth session of the Ad Hoc Committee, concerns were expressed about the standard set by the language of the Spanish text. It was agreed that this would be made to match the English-language standard of "reasonable grounds". Similar changes would be made in the glossary in preparation by the Secretariat if necessary.

[67] At the sixth session of the Ad Hoc Committee, to respond to concerns about the meaning of "to board" in various languages, the wording was changed to read "to board and inspect".

[68] At the sixth session of the Ad Hoc Committee, the reference to "evidence of involvement in smuggling" was added for greater consistency with terminology elsewhere in the draft Protocol.

[69] The language of this provision is derived from paragraph 16 of the IMO interim measures.

[70] At the sixth session of the Ad Hoc Committee, it was noted that the substance of this provision overlapped that of article 14, paragraph 8 (on appointment of central authorities for mutual legal assistance), of the draft Convention and should therefore be re-examined once that provision had been finalized.

[71] At the sixth session of the Ad Hoc Committee, there was discussion of whether the safeguard provisions of article 7 *ter* should be made applicable to actions taken with respect to any provision of the entire Protocol. The preference of delegations was for application throughout the Protocol and this was adopted for the purpose of future discussion, bearing in mind that an ultimate decision would depend on the drafting of the final provisions and might have to be reconsidered at that point.

persons on board and shall make sure that any action taken with regard to the vessel is environmentally sound.[72]

2. If any measures are taken against a vessel suspected of being engaged in the smuggling of migrants by sea, the State Party concerned shall take due account of the need not to endanger the safety of human life at sea, the security of the vessel or its cargo, or to prejudice the commercial and/or legal interests of the flag State or any other interested State[73] [ensure that the safety of human life at sea is not endangered and that the security of the vessel and its cargo and the commercial or legal interests of the flag State or any other interested State or party are not prejudiced].[74]

3. Where measures taken pursuant to this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.[75]

4. States Parties shall take, adopt or implement such measures in conformity with international law with due regard to:

(a) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel; and

(b) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the law of the sea.[76, 77]

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[72] The language of this provision was originally taken from paragraph 17 of the IMO interim measures. At the sixth session of the Ad Hoc Committee, a group of delegations redrafted the provision to respond to concerns about terminology and the relationship between former subparagraphs (a) and (b). The group also expressed the view that the new text should become article 7 *ter*, paragraph 2, with the existing paragraph 2 of article 7 *ter* becoming paragraph 1. The Ad Hoc Committee agreed to adopt the above text, with its placement to be determined later.

[73] The language of this provision was originally taken from article 17, paragraph 5, of the 1988 Convention and from paragraph 7 of the IMO interim measures. During the sixth session of the Ad Hoc Committee, several delegations requested that the wording be changed to "take due account" for greater consistency with article 17, paragraph 5. The replacement of the word "and" with the word "or" and repunctuation of the list were done for the same reason and to ensure that all of the phrases were included in the list.

[74] This new text addresses concerns expressed by China and some other delegations at the sixth session of the Ad Hoc Committee. The text expresses the need to protect life at sea as a positive obligation and incorporates a reference to the interests of third parties that are not States, as proposed. The redrafting was made necessary by the positive construction of the wording dealing with life at sea.

[75] This proposal was made by China at the sixth session of the Ad Hoc Committee. The text is taken from article 110, paragraph 3, of the United Nations Convention on the Law of the Sea. Note that references to "ship" in that text are replaced with "vessel" for consistency with the other provisions of the draft Protocol. References to unfounded "suspicions" in that text have been changed because there is no prior reference to suspicion in this article.

[76] At the sixth session of the Ad Hoc Committee, the delegation of Singapore proposed replacing the text of this paragraph with the following text, based on article 17, paragraph 11, of the 1988 Convention:

"3. Any action taken in accordance with this article shall take due account of the need not to interfere with or to affect:

"(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; and

"(b) The authority of the flag State to exercise jurisdiction and control in administration, technical and social matters involving the vessel."

[77] The language of this provision is derived from article 17, paragraph 11, of the 1988 Convention and from paragraph 6 of the IMO interim measures.

5. Any action taken at sea pursuant to articles 7 to 7 *quater* of this Protocol shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.[78]

6. Measures taken, adopted or implemented pursuant to this Protocol[79] shall be in conformity with international law.[80]

Article 7 quater
Application

States Parties shall consider entering into bilateral or regional agreements to facilitate cooperation in applying appropriate, efficient and effective measures to prevent and suppress the smuggling of migrants by sea.[81] States Parties shall also encourage the conclusion of operational arrangements in relation to specific cases (ad hoc arrangements).[82]

III. Cooperation, prevention and other measures[83]

Article 8
Compliance measures and arrangements

1. States Parties shall adopt every legislative and administrative measure needed in order to comply with the obligations deriving from this Protocol, having respect for the principles of sovereignty, territorial integrity and non-interference in internal affairs.

2. States Parties shall consider the conclusion of bilateral or regional agreements or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent, combat and limit the illegal smuggling of migrants, in accordance with this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

[78] The language of this provision is derived from article 17, paragraph 10, of the 1988 Convention and from paragraph 20 of the IMO interim measures.

[79] See footnote 71 above concerning the application of this article throughout the Protocol.

[80] The language of this provision was originally taken from paragraph 5 of the IMO interim measures. At the sixth session of the Ad Hoc Committee, the expanded reference to specific international legal instruments was deleted for the same reasons as given with respect to article 7, paragraph 1. Several delegations indicated a preference for the greater certainty of listing the major relevant international legal instruments, in particular the United Nations Convention on the Law of the Sea.

[81] The language of this provision is derived from article 17, paragraph 9, of the 1988 Convention and from paragraph 9 of the IMO interim measures.

[82] The language of this provision is derived from paragraph 10 of the IMO interim measures.

[83] There was a brief discussion at the sixth session of the Ad Hoc Committee about whether articles 8-11 were common with provisions of the draft Convention, and, if so, whether they were needed in the draft Protocol itself. No changes were made to the text, but several new proposals were submitted for consideration. The delegation of Mexico proposed new text for articles 8-11 (A/AC.254/L.96). The delegation of Germany proposed to make the application of article 9 discretionary rather than mandatory (A/AC.254/L.97). The delegation of Argentina proposed a new chapter III for the draft Protocol, dealing with trafficking in migrants by land. It was decided that further discussion of these articles would be deferred until texts for the corresponding provisions of the draft Convention had been agreed to (A/AC.254/L.99).

Article 9
Additional legislative and administrative measures

States Parties shall take such additional legislative or other measures as they consider appropriate to prevent means of transportation operated by commercial carriers from being used in the commission of offences established under article 4 of this Protocol. Such measures shall include, in appropriate cases, fines and forfeiture to ensure that carriers, including any transportation company, or the owner or operator of any vessel or vehicle, screen all passengers to see that they have valid passports and visas, if required, or any other documentation necessary for legal entry into the receiving State.

Article 10
Information

1. States Parties shall take measures to ensure that they provide or strengthen information programmes to increase public awareness of the fact that the smuggling of migrants is a criminal activity frequently perpetrated by criminal organizations for profit and that it poses serious risks to the migrants involved.

2. Pursuant to article 22 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from becoming victims of criminal organizations.

3. Without prejudice to articles 19 and 20 of the Convention, States Parties shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, in conformity with their respective national laws and applicable treaties or arrangements, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by criminal organizations engaged in the smuggling of migrants;

(b) The identity and methods of organizations or criminal associations known to be or suspected of being engaged in the smuggling of migrants;

(c) The authenticity and proper form of travel documents issued by a State Party and advice concerning the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction, acquisition or other misuse of travel or identity documents used in the smuggling of migrants and ways of detecting them;

(e) Legislative experiences, practices and measures to prevent, combat and eradicate the smuggling of migrants; and

(f) Relevant scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the smuggling of migrants and to prosecute those involved.

Article 11
Prevention

1. States Parties shall adopt such measures as may be necessary to detect and prevent the smuggling of migrants between their respective territories and that of other States Parties, by strengthening border controls, including by checking persons and travel

or identity documents, and, where appropriate, by inspecting and seizing vehicles and vessels.

2. Without prejudice to article 19 of the Convention, States Parties shall consider intensifying cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

Article 12
Security and[84] *control of documents*

States Parties shall adopt such measures as may be necessary, in accordance with available means:

(a) To ensure that travel or identity documents issued by them are of such quality that they cannot easily be misused and cannot readily be unlawfully altered, replicated, falsified[85] or issued;[86] and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the States Parties and to prevent their unlawful creation, issuance and use.[87]

Article 13
Legitimacy and validity of documents

States Parties shall, upon request by other States Parties and subject to the domestic laws of the requested State Party, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in the

[84] Proposal of the delegation of France at the sixth session of the Ad Hoc Committee.

[85] Proposal of the delegation of Saudi Arabia at the sixth session of the Ad Hoc Committee.

[86] At the sixth session of the Ad Hoc Committee, a number of delegations expressed concern about the cost implications of this provision for developing countries and some delegations proposed making its application discretionary or conditional on available means. Other delegations expressed concern that the reference to "misuse" might be viewed as an attempt to create an obligation to criminalize misuse, which should be dealt with in article 4. As a result, the words "in accordance with available means" were added and the phrase "otherwise misused" was revised and moved to clarify that the provision would call upon States only to prevent misuse by employing high-quality documents. Three delegations continued to seek the deletion of the reference to "misuse". One delegation also sought to replace the words "shall adopt" with the words "are encouraged to adopt".

[87] The revisions to former article 12, paragraph 2, now article 12, subparagraph (b), result from the work of an informal drafting group that met during the sixth session of the Ad Hoc Committee. The new text was not considered prior to adjournment and still requires agreement. A number of delegations had expressed concern about the uncertainty of the previous text and the underlying policy objectives. It emerged that the provision was seen not only as a control on materials and blank or unissued documents, but also as a more general control on the issuance process. Some delegations also expressed concern about the possible cost implications of this provision and asked that the phrase "in accordance with available means" be included. There was general agreement that the underlying objective was to ensure that, once a high standard for the quality of documents was set by subparagraph (a), the more sophisticated documents did not fall into the hands of smugglers at any stage of the production or issuance process. The Chairperson noted that subparagraph (a) dealt with the *quality of documents* and called upon delegations to form an informal drafting group to develop a revised text based on three new topics: the *security of documents* in production and before issuance; the *security or integrity of the issuance process* itself; and the *validation or verification of documents* after they had been issued. Note that the text of this provision parallels the text of article 9 of the draft Trafficking in Persons Protocol, as that text was reorganized at the sixth session. During deliberations on that text, the Ad Hoc Committee decided to incorporate these same changes for purposes of further discussion.

name of the requested State Party and suspected of being used in the smuggling of migrants.[88]

Article 14
Training

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the smuggling of migrants and in treating smuggled migrants.

2. States Parties shall cooperate with each other and with competent international organizations, as appropriate, to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the smuggling of migrants and to protect the rights of victims of such [smuggling] [trafficking] and illegal transport. Such training shall include, *inter alia*:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organizations or criminal associations known to be or suspected of being engaged in the smuggling of migrants, the methods used to transport smuggled migrants, the misuse of travel or identity documents for smuggling migrants and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for searching for and detecting, at conventional and non-conventional points of entry and exit, concealed, undocumented or improperly documented persons; and

(e) Recognizing the need to provide humane treatment to and protect the human rights of migrants.

3. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the smuggling of migrants. States Parties with relevant expertise should consider providing technical assistance to States that are frequently used as States of origin or as transit States for the smuggling of migrants.

[88] At the sixth session of the Ad Hoc Committee, three changes to this provision were agreed upon. The reference to "Party" was changed to "State Party" (proposal of the delegation of the United Kingdom of Great Britain and Northern Ireland), the words "without undue or unreasonable delay" were replaced with the words "within a reasonable time" (proposal of the delegation of Morocco) and the reference to "documents issued" was expanded to read "issued or purported to have been issued" (proposal of the delegation of Canada). Note that the text of this provision parallels the text of article 6, paragraph 3, of the draft Trafficking in Persons Protocol, as that text was reorganized at the sixth session. During deliberations on that text, the Ad Hoc Committee decided to incorporate these same changes for purposes of further discussion.

[*Article 15*
Return of smuggled migrants[89]

1. Each State Party agrees to facilitate and accept, without delay, the return of a person who has been smuggled contrary to the terms of this Protocol who is a national of that State Party or who had the right of abode in the territory of that State Party at the time of entry into the receiving State.

2. At the request of the receiving State Party, States Parties shall, without undue or unreasonable delay, verify whether a person who has been smuggled contrary to the terms of this Protocol is a national of the requested State Party.

3. In order to facilitate the return of a person smuggled contrary to the terms of this Protocol without proper documentation, the State Party of whom the person is a national or in which the person had the right of abode at the time of entry into the receiving State shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person's readmission into its territory.]

Article 15 bis
Saving clause

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.[90, 91]

[89] At the sixth session of the Ad Hoc Committee, a majority of delegations supported retaining this article, subject to further discussion. Amendments were proposed by the delegations of France (case-by-case implementation), the Philippines (new paragraph emphasizing the rights of migrants and their status as victims) and Ukraine (limitation of paragraph 1 to persons who were nationals or had a right of permanent abode in the source country), but there was no general agreement in support of any of these proposals. Substantively, some delegations expressed the view that making provision for the return of migrants was necessary as a means of deterring migrants and organized criminal groups and was necessary to ensure the right of the migrants themselves to return to their place of origin. Other delegations proposed either deletion or modification on the basis that the provision was beyond the mandate given to the Ad Hoc Committee by the General Assembly and that it unfairly placed the burden on the migrants themselves. One suggested compromise was that the provision might be retained, but with language that would ensure that migrants could only be returned voluntarily and that their rights of due process were protected. The Chairperson invited delegations to work unofficially on new text, which would have only the status of a proposal from one or more sponsoring delegations at a future session.

[90] At the eighth session of the Ad Hoc Committee, it was decided to replace the previous text of article 5, paragraph 2, with new text based on the proposal of Belgium and Norway (A/AC.254/L.189) and article 13 of the revised draft Trafficking in Persons Protocol (A/AC.254/4/Add.3/Rev.5), as agreed at the seventh session. It was also decided to place the text here for greater consistency with the text of the Trafficking in Persons Protocol. Some delegations expressed concern about the inclusion of the words "and the principle of non-refoulement as contained therein". In their view this was redundant vis-à-vis the international instruments cited in the new article, which also contained principles of non-refoulement. One delegation also felt that the reference to a specific principle of international law could lead to the interpretation that other established principles might not apply. One delegation noted that text dealing with "principles of non-discrimination" appeared in the original proposal of Belgium and Norway and in article 13 of the Trafficking in Persons Protocol and wondered whether they should be included in this provision as well. The discussions on this provision also considered proposals of Morocco (see A/AC.254/5/Add.21) and Mexico (A/AC.254/L.160). The text of those proposals was not adopted, but may be relevant to other provisions and

IV. Final provisions

Article 16
Implementation[92]

1. For the purpose of examining the progress made by the States Parties in achieving the implementation of the obligations undertaken in the present Protocol, the States Parties will provide periodic reports to the Conference of the Parties to the Convention.

2. The States Parties will provide such reports together with the reports submitted in accordance with article 23 of the Convention.

Article 17
Settlement of disputes[93, 94]

1. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time [ninety days] shall, at the request of one of those Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may, at the time of [signature,] ratification [, acceptance] or [approval] of this Protocol, declare that it does not consider itself bound by paragraph 1 of this article. The other States Parties shall not be bound by paragraph 1 of this article with respect to any State Party that has made such a reservation.

3. Any State Party that has made a reservation in accordance with paragraph 2 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

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the delegations of Mexico and Morocco reserved the right to raise their proposals again at the appropriate time.

[91] At the eighth session of the Ad Hoc Committee, some delegations expressed concerns about the implications of this provision for States that were not parties to the instruments referred to. In particular, the delegations of Saudi Arabia and the United Arab Emirates were concerned that, as a result of this wording, their Governments might be subject to obligations under those instruments, to which they are not parties, should they become parties to the Convention and the Protocol. It was pointed out that the opening words protected the integrity of existing obligations, but could not be interpreted as creating new ones. Thus, a State that was not already subject to such an obligation would not become subject to it simply by becoming a party to the Protocol. The delegations of Saudi Arabia and the United Arab Emirates asked that this fact be noted in the *travaux préparatoires*.

[92] One delegation proposed the deletion of this article because the issue of implementation and reporting requirements would be covered by the Convention.

[93] The text of these final provisions is identical to the text of the corresponding provisions of the draft Convention and is reproduced here in accordance with a decision taken by the Ad Hoc Committee at its sixth session (A/AC.254/23) and without prejudice to their content, which is still under negotiation. Only necessary editorial changes have been made to the text. For issues related to these provisions, see the footnotes to articles 25, 26 and 27-30 of the draft Convention.

[94] At the sixth session of the Ad Hoc Committee, it was agreed that various provisions, including article 5, paragraph 2 (now deleted), and portions of article 7 *ter*, would be revised and added to the final provisions as a "saving clause" applicable to the entire Protocol. Details of the text were deferred pending discussion of the final provisions.

Article 18
Signature, ratification, acceptance, approval, accession and reservations

1. This Protocol shall be open to all States for signature from [...] to [...] and thereafter at United Nations Headquarters in New York until [...].

2. The present Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations.

Option 1

[3. No reservations may be made in respect of any provision of this Protocol.]

Option 2

[3. Reservations shall be subject to the provisions of the Vienna Convention on the Law of Treaties of 1969.[95]]

[4. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States Parties at the time of ratification, acceptance, approval or accession.]

[5. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General.]

6. This Protocol is subject to accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 19
Entry into force

1. The present Protocol shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the [...] instrument of ratification, acceptance, approval or accession.

2. For each State Party ratifying, accepting, approving or acceding to the Protocol after the deposit of the [...] instrument of such action, the Protocol shall enter into force on the thirtieth day after the deposit by such State of that relevant instrument.

Article 20
Amendment

1. A State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to the States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least

[95] United Nations, *Treaty Series*, vol. 1155, No. 18232.

one third of the States favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly of the United Nations for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of the States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties still being bound by the provisions of the present Protocol and any earlier amendments that they have accepted.

Article 21
Denunciation

A State Party may denounce the present Protocol by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 22
Languages and depositary

1. The Secretary-General of the United Nations is designated depositary of the present Protocol.

2. The original of the present Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed the present Protocol.

United Nations A/AC.254/4/Add.1/Rev.6

General Assembly

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Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime
Eleventh session
Vienna, 2-27 October 2000
Item 4 of the provisional agenda*
Finalization and approval of the additional international legal instrument against illegal trafficking in and transporting of migrants

Revised draft Protocol against the Smuggling[1] of Migrants by Land, Air and Sea,[2] supplementing the United Nations Convention against Transnational Organized Crime[3, 4]

* A/AC.254/35.

[1] The term "smuggling" is used throughout the text in the light of action taken by the General Assembly at its fifty-fourth session on the recommendation of the Commission on Crime Prevention and Criminal Justice and the Economic and Social Council. During the discussion at the first session of the Ad Hoc Committee, several delegations raised the issue of the translation of the term "smuggling" into languages other than English and the problems that it created. Attention will, therefore, be paid to identifying the appropriate term to be used in languages other than English. That will be done in the glossary of terms that the Secretariat is currently preparing. Existing texts on the subject, such as General Assembly resolutions 48/102 of 20 December 1993 and 51/62 of 12 December 1996 and Economic and Social Council resolution 1995/10 of 24 July 1995, might be useful in this regard. The Ad Hoc Committee will reconsider this matter at a future session. When agreement is reached on the wording of the title, the terminology will be adjusted in provisions throughout the text, as necessary.

[2] In its resolution 53/111 of 9 December 1999, the General Assembly requested the Ad Hoc Committee to discuss the elaboration of an international instrument addressing illegal trafficking in and transporting of migrants, including by sea. The Ad Hoc Committee at its first session was of the view that focusing on illegal trafficking and transporting by sea would be too restrictive.

[3] The text of the draft Protocol is based on the original proposal of Austria and Italy (A/AC.254/4/Add.1), with subsequent modifications as noted.

[4] At the sixth session of the Ad Hoc Committee, it was noted during the deliberations on the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the "Trafficking in Persons Protocol") that the words "each State Party" and "States Parties" were used interchangeably in the text. The Committee decided to adopt the term "States Parties" throughout the text. For consistency, the same change has been made here, where possible.

V.00-55782 (E)

Preamble[5]

The States Parties to this Protocol,

[(a) *Taking note* of the United Nations Convention against Transnational Organized Crime,]

(b) *Concerned* about the rapid development of the smuggling of migrants,

[(c) *Alarmed* by the significant increase in the activities of transnational criminal organizations that make illicit profits by smuggling migrants across national boundaries,]

[(d) *Recognizing* that transnational criminal organizations also use the smuggling of migrants to further numerous other criminal activities, thus bringing great harm to the States concerned,]

(e) *Concerned* that the smuggling of migrants may lead to the misuse of established procedures for immigration, including those for seeking asylum,[6]

[(f) *Also concerned* that the smuggling of migrants can endanger the lives or security of the individual migrants involved and entails great expense for the international community, including the costs of rescue, medical care, food, housing and transportation,]

[(g) *Reaffirming* that States should give high priority to preventing, combating and eradicating the smuggling of migrants because of the links of such activity with transnational organized crime and other criminal activities,]

[(h) *Convinced* that combating the smuggling of migrants requires international cooperation, the exchange of information and other appropriate measures at the national, regional and global levels,]

(i) *Also convinced* that, to counter this phenomenon, a global approach, including socio-economic measures, is necessary,

(j) *Further convinced* of the need to provide migrants with humane treatment and full protection of their human rights,

(k) *Convinced* of the need for a comprehensive international legal instrument to combat all aspects of the transnational smuggling of migrants by land, sea and air,

(l) *Stressing* the importance of full compliance by States with their obligations under the provisions of the 1951 Convention[7] and the 1967 Protocol[8] relating to the Status of Refugees, and affirming that this Protocol does not affect the protection afforded under the terms of the 1951 Convention and the 1967 Protocol and other provisions of international law,

(m) *Recalling* the work of the International Maritime Organization concerning unsafe practices associated with trafficking in or transporting of illegal migrants by sea, in particular the work of the Maritime Safety Committee, which approved the interim

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[5] Several delegations were of the view that the preamble should contain provisions to address the underlying causes of the illegal movement of people and to reaffirm the principle of free movement of people. Most delegations were of the view that it would be most useful to consider the preamble after the finalization of the text of the substantive articles.

[6] Several delegations were of the view that the question of refugees should also be addressed.

[7] United Nations, *Treaty Series*, vol. 189, No. 2545.

[8] Ibid., vol. 606, No. 8791.

measures for combating unsafe practices associated with the trafficking or transport of migrants by sea,[9]

(n) [*Text on decisions of the International Civil Aviation Organization to be added*],

[(o) *Reaffirming* respect for the sovereignty and territorial integrity of all States, including their right to control immigration flows,]

(p) *Desiring* to supplement the United Nations Convention against Transnational Organized Crime by a protocol directed specifically against the smuggling of migrants, as a first step towards the eradication of that crime,[10]

[(q) *Declaring* that such an instrument must concentrate on crime prevention and criminal justice, in particular the activities of those who organize and facilitate the smuggling of migrants,]

Have agreed as follows:

I. General provisions relating to the smuggling of migrants by land, sea and air

Option 1

Article 1
Relation to the United Nations Convention against Transnational Organized Crime

This Protocol supplements the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], and, as regards the States Parties to this Protocol, those two instruments shall be read and interpreted together as one single instrument.[11]

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[9] One delegation suggested that the International Maritime Organization (IMO) circular containing the interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea (MSC/Circ.896) could be a useful source of inspiration, but that the drafting of the text of the present instrument should not necessarily be conditioned by that circular.

[10] One delegation suggested that the preamble should be supplemented with language stressing the effects of illegal trafficking or smuggling on national security, as well as the need to strengthen cooperation and coordination between States.

[11] For the discussion on the relationship between the draft Convention and the international instruments whose drafting has been entrusted to the Ad Hoc Committee pursuant to General Assembly resolutions 53/111 and 53/114 of 9 December 1998, see also the report of the Ad Hoc Committee on its first session (A/AC.254/9). At the fourth session of the Ad Hoc Committee, some delegations expressed their preference for option 1 over option 2, while other delegations were of the view that it was too early to decide which option to choose. One delegation suggested that the principle of *mutatis mutandis* application, as reflected in option 2, should be included in the text of option 1. Another delegation suggested that the article should be moved to the chapter on final provisions. During a brief discussion at the eighth session of the Ad Hoc Committee, one delegation proposed that the Secretariat be asked to prepare a combined text for possible use in all three draft Protocols. Further discussion was deferred.

Option 2

Article 1
Application of the United Nations Convention against Transnational Organized Crime

The provisions of articles [...] of the United Nations Convention against Transnational Organized Crime (hereinafter referred to as "the Convention"), done at [...], shall also apply *mutatis mutandis* to this Protocol.

Article 2[12]
Definitions

For the purposes of this Protocol, the following definitions shall apply:

(a) "Smuggling of migrants" shall mean the procurement of the illegal entry into or illegal residence of a person in [a] [any] State Party of which the person is not a national or a permanent resident in order to obtain, directly or indirectly, a financial or other material benefit;[13]

(b) "Illegal entry" shall mean the crossing of borders without complying with the necessary requirements for legal entry into the receiving State;[14]

(c) "Illegal residence" shall mean remaining in the territory of a State without complying with the necessary requirements for legally remaining in the State concerned;[15, 16]

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[12] The articles on definitions (article 2) and purposes (article 3) will need to be reviewed in the light of choices made with regard to options that appear later in the text. In addition, those articles will need to be reviewed to ensure their consistency with the draft Convention.

[13] At the eighth session of the Ad Hoc Committee, new text was adopted for this provision, based on the proposal of Austria and Italy (A/AC.254/L.179). There was agreement that wording that included reference to direct and indirect benefits was preferable to the word "profit", but some delegations reserved their positions on the use of the words "in any State Party" pending further consultations. Several delegations expressed concern that the Protocol should focus on illegal entry rather than on illegal residence and preferred the text proposed by Mexico. Discussion on the question continued and the Chairperson indicated that, in her view, there was still room to take those concerns into account in the text. The delegation of Mexico concurred in this, but reiterated that the scope of the Protocol and the extent to which it would deal with illegal residence were matters of serious concern to it and not just questions of terminology. Several delegations expressed interest, but reserved comment on Mexico's proposal pending translation. The proposal of Mexico read as follows:

> "'Smuggling of migrants' shall mean the procurement of irregular entry with the purpose of permitting the illegal stay or illegal residence in a State Party of which the person is not a national, a temporary visitor or a permanent resident in order to obtain[, directly or indirectly, a financial or other material benefit] [a profit]."

[14] At the eighth session of the Ad Hoc Committee, the delegation of Mexico proposed the use of the words "irregular entry" instead of "illegal entry", but it was decided to retain the existing text.

[15] New text for this provision was agreed at the eighth session of the Ad Hoc Committee on the basis of text prepared by an informal working group (A/AC.254/L.180).

[16] At the eighth session of the Ad Hoc Committee, previous subparagraph (d) of this article contained in document A/AC.254/4/Add.1/Rev.4 was deleted following the insertion of new text into subparagraph (a). That text replaced the word "profit" with a reference to financial and other benefits based on subparagraph (a) of article 2 *bis* of the draft Convention (see A/AC.254/L.179). A few delegations preferred the greater certainty of expressly defining "profit" in the draft Protocol.

(d) "Fraudulent travel or identity document" shall mean any travel or identity document:[17]

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State;[18] or

(ii) That has been improperly issued or obtained through misrepresentation, corruption, duress or any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;[19]

(e) "Vehicle" shall mean any conveyance that may be used for transportation by land or air; and[20]

(f) "Vessel" shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.[21, 22]

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[17] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested either deleting this subparagraph or moving it to article 4, while other delegations were in favour of retaining it. At the eighth session, one delegation suggested adding the words "used for international travel" at the end of this subparagraph. Most delegations were concerned that this would be too restrictive, as purely domestic documents frequently played a role in migrant smuggling.

[18] At the eighth session of the Ad Hoc Committee, there was lengthy discussion about the meaning of the words "falsified", "falsely made" and "altered". The intention was to deal with the acts of unauthorized persons and it was decided to use the words "falsely made or altered". It was agreed that this included not only the creation of false documents, but also the alteration of legitimate documents and the filling in of stolen blank documents.

[19] At the eighth session of the Ad Hoc Committee, many delegations felt that the text of subparagraphs (d) (ii) and (iii) of article 2 should be dealt with under the provisions of article 4 that criminalize the misuse of documents. Some delegations pointed out that those subparagraphs were intended to define as "fraudulent" a document that was being misused, even if the document itself was genuine.

[20] At the eighth session of the Ad Hoc Committee, discussion continued on the question of whether it was appropriate to define aircraft as a type of vehicle. Some delegations proposed to define "aircraft" separately. Most delegations would be satisfied with either one or two definitions, provided that the articles that at present referred to vehicles, namely, articles 9 (Additional legislative and administrative measures), 11 (Prevention) and 14 (Training), included aircraft, if these were defined separately. It was decided to retain the existing text pending a review of those articles. The delegation of China pointed out that the definition of "vessel" in the draft Protocol and the International Civil Aviation Organization's definition of "aircraft" both excluded police and military vessels or aircraft and suggested that a similar exclusion should be applied to vehicles and aircraft in the draft Protocol.

[21] The source of the definition of "vessel" is the definition of "ship" provided in paragraph 2 of the IMO interim measures. At the eighth session of the Ad Hoc Committee, there were proposals to replace the word "vessel" with the word "ship" and to exclude vessels without propulsion, but it was decided to retain the text as it was.

[22] Paragraph 2 of this article was deleted at the eighth session of the Ad Hoc Committee (see A/AC.254/4/Add.1/Rev.4, footnote 33). Some delegations felt that the substance of the paragraph should be dealt with, if at all, in article 6. Others noted that the need for a requirement that States Parties treat illegal entry or residence involving other States in the same way as illegal entry or residence involving their own territories depended in part on whether the words "in any State Party" or "in a State Party" were included in article 2, paragraph 1 (a). See also the footnote to that provision (footnote 13).

Article 3
Purposes

The purposes of this Protocol are:[23]

(a) To prevent, investigate and prosecute the smuggling of migrants, when involving an organized criminal group, as defined in the Convention; and

(b) To promote and facilitate cooperation among States Parties to meet these objectives; [and,

(c) To promote international cooperation in the interests of the protection of the victims of such trafficking and respect for their human rights.][24]

Article 3 bis
Criminal liability of migrants

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been smuggled.[25]

Article 4
Criminalization

1. States Parties that do not already have in their domestic law offences covering the conduct described in this paragraph shall adopt the necessary legislation

[23] The informal consultations held during the fifth session of the Ad Hoc Committee recommended replacement of the words "when committed in the context of transnational organized crime" with the words "when involving an organized criminal group". At the eighth session, it was decided to replace the text with a proposal made by France and the United States of America (A/AC.254/L.178), as amended by the United States during the discussions. That text now forms subparagraphs (a) and (b) of article 3. Some delegations again expressed concern that the reference to smuggling "involving" an organized criminal group was too broad and preferred the words "when committed by". Some delegations also expressed concern that including the reference to an "organized criminal group" might result in an overly restrictive interpretation of the scope of the Protocol. One delegation proposed that the order of the paragraphs be changed to match that of article 3 of the draft Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime. The present order is more consistent with the draft Trafficking in Persons Protocol, however, which has more similar content, and it was therefore decided to maintain the order originally proposed.

[24] At the eighth session of the Ad Hoc Committee, there was extensive discussion of the need to incorporate text referring to the protection of victims or migrants. Most delegations supported this in principle. Many preferred placing the text in article 3, but a substantial number argued that it should be included elsewhere instead. For purposes of further discussion, it was decided to incorporate the text of article 1, paragraph 2, of the proposed alternative text for the draft Protocol submitted by Mexico at the sixth session (A/AC.254/L.96). It was also decided that the text should be placed in brackets pending further discussion. One delegation proposed that, if this text were to be used, the words "victims of such trafficking" should be replaced with the words "smuggled migrants" for greater consistency with the substance of the draft Protocol.

[25] New text for this provision was produced by a working group at the eighth session of the Ad Hoc Committee (A/AC.254/L.193). The Committee noted that the placement of the text in the draft Protocol might have to be reviewed later. The delegation of Mexico noted that the question of whether or how article 4 of the draft Protocol would apply to persons who smuggled only migrants who were relatives or members of their immediate families was still not addressed in the text. (See paragraph 3 of the article on implementation measures proposed by Mexico (A/AC.254/L.160) and document A/AC.254/L.193, footnote 1.)

or other measures to establish as criminal offences when committed intentionally [and when involving an organized criminal group]:[26]

(a) The smuggling of migrants;

(b) When committed for the purpose of enabling the smuggling of migrants:

(i) Producing a fraudulent travel or identity document;

(ii) Procuring, providing or possessing such a document.[27, 28]

2. Each State Party shall also adopt the necessary legislation or other measures to establish as a criminal offence the following conduct:[29]

(a) Attempting to commit an offence set forth in paragraph 1 of this article;[30]

(b) Participating as an accomplice[31] in an offence set forth in paragraph 1 of this article;[32]

(c) Organizing or directing others to commit an offence set forth in paragraph 1 of this article;[33] or

[(d) In any other way contributing to the commission of an offence set forth in this article by a group of persons acting with a common purpose; such contribution shall be intentional and shall either be made with the aim of furthering the general criminal activity or purpose of the group or be made in the knowledge of the intention of the group to commit the offence or offences concerned.][34]

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[26] Discussions continue with respect to the question of whether the Protocol should apply to offences that "involve" an organized criminal group in some general way or only to offences actually "committed by" such a group. During the eighth session of the Ad Hoc Committee, a majority of delegations favoured the broader language "when involving" and felt that consistent language should be used throughout the Protocol on this question. (See the notes to article 5 below for details.)

[27] The text of this provision was produced by an informal working group set up during the eighth session of the Ad Hoc Committee (see A/AC.254/L.173). It replaced both of the options contained in document A/AC.254/4/Add.1/Rev.4. One delegation expressed concern that this provision might include offences of simple possession of illicit documents, a matter for domestic law. It was pointed out in response that the offence of possession under subparagraph (b) (ii) would only apply where the possession in question was for the purpose of smuggling migrants as set out in subparagraph (a). Several delegations requested that this view be recorded in the *travaux préparatoires*.

[28] At the eighth session of the Ad Hoc Committee, one delegation suggested that violation of human rights should be established as a crime under this article, a suggestion that was opposed by several delegations on the ground that it was already covered under paragraph 5.

[29] At the eighth session of the Ad Hoc Committee, there was agreement in principle that the text of this article should correspond to parallel text in the draft Convention. It was decided to defer further discussion pending completion of that text.

[30] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested combining subparagraphs 2 (a), (b) and (c).

[31] At the fourth session of the Ad Hoc Committee, one delegation suggested deleting the words "as an accomplice". At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation opposed the deletion of those words.

[32] Some delegations were of the view that, notwithstanding paragraph 6 of this article (now deleted), the concept of participation required clarification.

[33] At the fourth session of the Ad Hoc Committee, some delegations suggested inserting the words "or attempting to commit such an offence" after the word "article" and deleting subparagraph (a).

[34] This subparagraph was proposed by the delegations of Canada and the United States. The language is taken from article 2, paragraph 3 (c), of the International Convention for the Suppression of Terrorist Bombings (General Assembly resolution 52/164, annex) and is intended to ensure that the Protocol will be broad enough

3. States Parties shall make the commission of the offences set forth in this article liable to sanctions that take into account the grave nature of the offences.

4. States Parties that have not yet done so shall adopt the necessary legislation or other measures to establish as aggravating circumstances to the offence of the smuggling of migrants circumstances:[35]

(a) That endanger, or are likely to endanger, the life or safety of persons whose illegal entry is procured or intended; or

(b) That entail [exploitation or][36] inhuman or degrading treatment[37] of such persons.[38]

5. Nothing in this Protocol shall prevent States Parties from taking measures against a person whose conduct constitutes an offence under their domestic law.[39]

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to encompass both conspiracy and participation in a criminal organization. At the informal consultations held during the fifth session of the Ad Hoc Committee, some delegations stated that this subparagraph needed to be clarified.

[35] At the eighth session of the Ad Hoc Committee, proposals from the delegations of Australia and Colombia for this provision were discussed at length. The major issue was whether the circumstances listed would be aggravating factors for all offences under the Protocol or only for the principal offence of smuggling migrants. The text eventually agreed to is based on the second, narrower approach and compromise drafting.

[36] This proposal was made by the delegation of Colombia at the eighth session of the Ad Hoc Committee. There was no consensus about whether these words should be added or not and it was decided to place them in brackets for further consideration. Some delegations felt that this language would provide better protection for migrants, while others felt that all possible cases of exploitation would be dealt with by the proposed Trafficking in Persons Protocol and that the content of that instrument should not be duplicated here. .

[37] At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested inserting the words "and smuggling of" after the word "treatment", while other delegations opposed the insertion of those words.

[38] At the fourth session of the Ad Hoc Committee, Austria suggested including this wording as an option in the main body of the text in order to combine paragraphs 5 and 6 of this article (now deleted). At the informal consultations held during the fifth session of the Ad Hoc Committee, one delegation suggested that the element of "exploitation" in option 1 should be included in option 2.

[39] The text of this paragraph was proposed by a working group set up during the eighth session of the Ad Hoc Committee (see A/AC.254/L.193) and was adopted at that session for purposes of further discussion.

Article 5
Scope of application

[Except as otherwise provided,] this Protocol applies to offences established under this Protocol [that involve] [that are committed by][40] an organized criminal group as defined in the Convention.[41]

[*Paragraph 2 has been deleted and replaced with new article 15 bis.*]

Article 6
Jurisdiction[42]

1. Each State Party shall take legislative measures to establish its jurisdiction over the offences set forth in article 4 of this Protocol in accordance with article 9 of the Convention.

2. If more than one State Party intends to assume jurisdiction over an alleged offender in accordance with paragraph 1 of this article and with article 9 of the Convention, the States Parties concerned shall consult each other with a view to renouncing jurisdiction in order to render possible proceedings in the territory of the State Party most directly affected by the commission of the smuggling of migrants.[43]

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[40] The major outstanding issue with respect to the application of the Protocol remains the question of whether it would apply only to cases where an offence has actually been committed by an "organized criminal group" or to cases where there is some less direct involvement as well. The Chairman pointed out that it would be necessary to resolve this at the next session and asked delegations to take the matter up with their Governments in the interim. A majority of delegations that spoke on this point supported the words "that involve". In their view, the Protocol should have a relatively broad application. Many pointed out that when States Parties sought to apply the Protocol in specific cases, they would be seeking assistance with an ongoing investigation. At such times, it might not be known whether organized crime was involved or it might be impossible to meet any basic standard of proof as a prerequisite to obtaining assistance under the Protocol. Those who preferred the words "when committed by" felt that the Protocol should apply to a narrower range of cases. A large majority of the delegations speaking on both sides of the issue pointed out that the same question arose in other articles, in particular article 4, and indicated that, once the problem was resolved, the same rule and the same language should be used in other articles to make them consistent.

[41] The new text of this paragraph is based on a compromise text submitted by the delegations of Mexico and the United States at the eighth session of the Ad Hoc Committee. The words "Except as otherwise provided" were proposed to allow some flexibility to extend the application of the Protocol further with respect to specific articles should this prove necessary. Some delegations had concerns about this and it was decided to place the text in brackets pending an assessment, as other articles were reviewed, as to whether it would actually be necessary. The delegation of Germany noted that this provision might not be needed at all, if the nature of the required link to offences committed by transnational organized crime groups was clarified in articles 3 and 4. Several delegations also expressed concern about circularity in the language, which had the Protocol apply to offences established by the Protocol.

[42] It is understood that the provisions on extradition, mutual legal assistance and other forms of international cooperation in criminal matters that would appear in the Convention would apply to the Protocol. In addition, it is understood that any provisions relating to human rights of detainees should be contained in the Convention. However, there is a need to review the question of whether any additional provisions would be necessary in view of the specific nature of the Protocol.

[43] Some delegations were of the view that this paragraph should be made consistent with article 9 of the draft Convention.

II. Smuggling[44] of migrants by sea[45]

Article 7
Cooperation and mutual assistance

States Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea, in accordance with the international law of the sea.[46]

[*Paragraph 2 of article 7 was moved to become paragraph 1 of article 7 bis and the subsequent paragraphs of article 7 bis were renumbered accordingly.*]

Article 7 bis
Measures against the smuggling of migrants by sea

1. A State Party that has reasonable grounds to suspect that a vessel, which is flying its flag or claiming its registry, which is without nationality or which, though flying a foreign flag or refusing to show a flag, is in reality of the nationality of the State Party concerned, is engaged[47] in the smuggling of migrants by sea may request the assistance of

[44] Concerns about the use of the term "smuggling" are discussed in the footnote to the word in the title of the draft Protocol (footnote 1).

[45] In the version of the draft Protocol contained in document A/AC.254/4/Add.1/Rev.2, this chapter included only one article (article 7). For the sake of clarity, the delegations of Austria and Italy proposed the structure followed in the present version. At the eighth session of the Ad Hoc Committee, time did not permit discussion of chapter II. It was noted that, unlike other elements of the draft Protocols to the draft Convention, these articles required the participation of delegates with specific expertise in maritime law. In order to facilitate their attendance, it was decided that these articles would be reviewed at the beginning of the next session of the Ad Hoc Committee at which the draft Protocol was scheduled for consideration.

[46] The language of this provision is derived from article 17, paragraph 1, of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (the "1988 Convention") and from paragraph 8 of the IMO interim measures. At the sixth session of the Ad Hoc Committee, it was decided to use a general reference to international law to include both customary and conventional international law as opposed to listing specific instruments. Not all States were parties to some instruments and a list might be interpreted as excluding any instruments not listed. The wording was changed to refer specifically to "the international law of the sea" at the recommendation of the informal consultations held during the ninth session. The informal consultations held during the ninth session also recommended that the United Nations Convention on the Law of the Sea be mentioned specifically in the *travaux préparatoires*.

[47] At the informal consultations held during the ninth session of the Ad Hoc Committee, it was proposed that the word "engaged" should be replaced with the word "involved", which some delegations felt would include vessels less directly involved in smuggling. The words "taking part in" and "participating in" were also considered, but there was no consensus to change the text. The Chairman asked the delegations concerned to propose suitable terminology for the next session at which the draft Protocol would be discussed. Consideration would then be given to adopting consistent language where that terminology appeared. In the English-language text, references to vessels "engaged ... in ... smuggling" occur in article 7 *bis*, paragraphs 1, 2 (in the chapeau and in subparagraph (c)) and 7. References to criminal groups "engaged ... in ... smuggling" also occur in article 10, paragraphs 1 and 3 (a) and (b).

other States Parties in suppressing the use of the vessel for that purpose. The States Parties so requested shall render such assistance within the means available to them.[48, 49, 50]

2. A State Party that has reasonable grounds to suspect that a vessel exercising freedom of navigation in accordance with international law and flying the flag or displaying marks of registry of another State Party is engaged[51] in the smuggling of migrants may so notify the flag State, request confirmation of registry and, if confirmed, request authorization from the flag State to take appropriate measures with regard to that vessel.[52] The flag State may authorize the requesting State, *inter alia*:

(a) To board the vessel;[53]

(b) To search[54] the vessel; and

(c) If evidence is found that the vessel is engaged[55] in the smuggling of migrants, to take appropriate measures with respect to the vessel, persons and cargo[56] on board, as

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[48] The language of this provision is derived from article 17, paragraph 2, of the 1988 Convention and from paragraph 11 of the IMO interim measures. During the sixth session of the Ad Hoc Committee, it was decided to replace the words "as is reasonable under the circumstances" with the words "within the means available to them", to bring the language closer to article 17, paragraph 2, of the 1988 Convention.

[49] At the sixth session of the Ad Hoc Committee, some delegations proposed moving this provision from article 7 to article 7 *bis* and the informal consultations held during the ninth session recommended that this be done.

[50] At the informal consultations held during the ninth session of the Ad Hoc Committee, two delegations were concerned that problems might arise when the assistance of third-party States was requested by a State in the belief that it was the flag State and had the right to authorize them to take action. If the belief was mistaken, the assisting States could be in breach of international law.

[51] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations proposed replacing the word "engaged" with the word "involved". (See the footnotes to article 7 *bis*, paragraph 1, above.)

[52] The language of this provision is derived from article 17, paragraph 3, of the 1988 Convention. The delegation of Denmark raised a reservation to this provision, indicating that, as a matter of Danish constitutional law, it could not expressly authorize another State to search a ship of Danish nationality or registry. It indicated that it could, however, undertake not to pursue any claims under Danish or international law against another State that took such action of its own accord, provided that such action was consistent with the Protocol.

[53] At the sixth session of the Ad Hoc Committee, several delegations expressed concern about the exact meaning of the word "board" and its translation into other languages. At issue was the extent to which use of the term would authorize the boarding of a vessel against the will of the person in charge of it. The word "board" appears in both the 1988 Convention and the IMO interim measures.

[54] At the informal consultations held during the ninth session of the Ad Hoc Committee, there was discussion about whether the word "inspect" or the word "search" was more appropriate here. Some delegations preferred an inspection power, as being broader and less intrusive, whereas others preferred the term "search" as being more suitable for the examination of a vessel believed to be engaged in criminal smuggling activities. One proposal raised was the use of the words "search or inspect" or the equivalent in all languages. Several delegations proposed the use of language matching article 17, paragraph 4, of the 1988 Convention; however, it was noted that while the English text of that instrument used the term "search", the French and Spanish texts used words more closely corresponding to "inspection". The Secretariat was requested to consult the United Nations translators and editors regarding recommended terminology that would be consistent in all languages. Some delegations, including the delegation of the Islamic Republic of Iran, requested that their preference for the word "inspection" in English be noted.

[55] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations proposed replacing the word "engaged" with the word "involved". (See the footnotes to article 7 *bis*, paragraph 1, above.)

[56] At the sixth session of the Ad Hoc Committee, several delegations expressed concern about the reference to "persons and cargo" in this context.

[expressly][57] authorized by the flag State [in accordance with article 7 *ter* of this Protocol].[58, 59]

3. A State Party that has taken any measure in accordance with paragraph 2 of this article shall promptly inform the flag State concerned of the results of that measure.[60]

4. A State Party shall respond expeditiously[61] to a request from another State Party to determine whether a vessel that is claiming its registry or flying its flag is entitled to do so and to a request for authorization made pursuant to paragraph 2 of this article.[62]

5. A flag State may, consistent with article 7[63] of this Protocol, subject its authorization to conditions to be agreed by it and the requesting State, including conditions relating to responsibility and the extent of effective measures to be taken.[64] A State Party shall take no additional measures without the express authorization of the flag State, except those necessary to relieve imminent danger to the lives of persons[65] or those which follow from relevant bilateral or multilateral agreements.[66]

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[57] At the sixth session of the Ad Hoc Committee, several delegations proposed that the word "explicitly" or the word "expressly" be added at this point for greater clarity. Other delegations expressed reservations about the possible effect on domestic law.

[58] Compromise text proposed by the Chairperson at the sixth session of the Ad Hoc Committee in response to the proposal of a number of delegations that a cross-reference to the safeguard provisions of article 7 *ter*, paragraph 3 (b), be added to this article.

[59] The language of this provision is derived from article 17, paragraph 4, of the 1988 Convention.

[60] The language of this provision is derived from article 17, paragraph 8, of the 1988 Convention and from paragraph 12 of the IMO interim measures.

[61] At the informal consultations held during the ninth session of the Ad Hoc Committee, one delegation suggested replacing the word "expeditiously" with the words "as soon as possible" or "as quickly as possible". It was noted that the same issue arose in paragraph 6 of this article, where there was a proposal to replace the words "as quickly as possible" with the word "expeditiously". However, at the end of the discussion of paragraph 6, deletion of the words "as quickly as possible" in that paragraph was recommended (see footnote 68).

[62] The language of this provision is derived from article 17, paragraph 7, of the 1988 Convention and from paragraph 14 of the IMO interim measures.

[63] The informal consultations held during the ninth session of the Ad Hoc Committee recommended replacing the former reference to article 7, paragraph 1, with a reference to article 7 only, as a consequence of its recommendation to move former paragraph 2 of article 7 to article 7 *bis*.

[64] At the sixth session of the Ad Hoc Committee, a number of delegations expressed concern that the words "the use of force" in this provision might be interpreted as an authorization or encouragement to use force. At the informal consultations held during the ninth session of the Ad Hoc Committee, it was agreed to recommend deleting these words.

[65] At the sixth session of the Ad Hoc Committee, many delegations expressed the view that the words "imminent danger" were too broad and required clarification. Some delegations sought clarification that the danger referred to was "to life". Others expressed a preference for limiting this provision to cases where there was danger to the lives of migrants. Others pointed out that cases could arise where the lives of crew members or boarding parties exercising their powers under paragraph 2 (a) might be endangered and that the wording should provide for this. At the informal consultations held during the ninth session of the Ad Hoc Committee, it was agreed to recommend removing the brackets from the words "to the lives or safety of persons" and to delete the words "or safety" from that phrase.

[66] The language of this provision is derived from article 17, paragraph 6, of the 1988 Convention and paragraph 13 of the IMO interim measures.

6. States Parties shall designate an authority or, where necessary, authorities[67] to receive and respond[68] to requests for assistance, confirmation of registry or of the right of a vessel to fly their flags and authorization to take appropriate measures.[69] Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation.[70]

7. A State Party that has reasonable grounds[71] to suspect that a vessel is engaged[72] in the smuggling of migrants by sea and is without nationality[73] or may be assimilated to a vessel without nationality, may board and search the vessel.[74] If evidence confirming the

[67] This text was revised at the sixth session of the Ad Hoc Committee to address the concerns of some delegations that two separate authorities might be needed. The delegation of Spain proposed that the words "an authority, or where necessary, authorities" be replaced with the words "a central authority, or where necessary, central authorities". At the informal consultations held during the ninth session of the Ad Hoc Committee, it was noted that the corresponding reference in article 14, paragraph 13, of the draft Convention had also not been finalized on this question. There was discussion about whether the two instruments should be made consistent on this point, once language for the Convention had been agreed. One delegation noted that there might be a need for different language in the Protocol because the authorities that dealt with maritime matters might not be the same as those dealing with general requests for mutual legal assistance under article 14 of the Convention. Whatever the outcome of the negotiations in relation to the Convention, most delegations opposed making reference to "central" authorities in the Protocol.

[68] The informal consultations held during the ninth session of the Ad Hoc Committee recommended deletion of the words "as quickly as possible". The concerns of one delegation about the use of the term "expeditiously" in paragraph 4 of this article were also noted with respect to this change.

[69] The language of this provision is derived from article 17, paragraph 7, of the 1988 Convention and paragraph 21 of the IMO interim measures.

[70] Pursuant to a proposal of the United States (A/AC.254/L.195), the informal consultations held during the ninth session of the Ad Hoc Committee recommended the addition of the following words: "Such designation shall be notified through the Secretary-General to all other States Parties within one month of the designation."

[71] At the sixth session of the Ad Hoc Committee, concerns were expressed about the standard set by the language of the Spanish text. It was agreed that this should be made to match the English-language standard of "reasonable grounds". Similar changes would be made in the glossary being prepared by the Secretariat if necessary. The informal consultations held during the ninth session of the Ad Hoc Committee recommended replacing the words "When there are reasonable grounds" at the beginning of this provision with the words "A State Party that has reasonable grounds". One delegation expressed concern that this might make the assessment of "reasonable grounds" a subjective matter for the State involved. Other delegations pointed out that, since the provision dealt only with the boarding of a stateless vessel, only one State would be in a position to make this determination in any event.

[72] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations proposed replacing the word "engaged" with the word "involved". (See the footnotes to article 7 *bis*, paragraph 2, above.)

[73] The informal consultations held during the ninth session of the Ad Hoc Committee recommended deleting wording that would have determined the nationality of the vessel "in accordance with the law of the sea" as unnecessary (see A/AC.254/4/Add.1/Rev.5). One delegation opposed the deletion on the basis that the additional words "in accordance with the law of the sea" provided greater certainty.

[74] At the sixth session of the Ad Hoc Committee, to respond to concerns about the meaning of "to board" in various languages, the wording was changed to read "to board and inspect". The informal consultations held during the ninth session of the Ad Hoc Committee recommended revising this sentence by replacing the words "shall board" with the words "may board" and consequently deleting the words "as necessary", and by replacing the word "inspect" with the word "search", subject to the concerns about language concordance noted with respect to paragraph 2 (b) of this article. The delegation of the Islamic Republic of Iran requested that its preference for the term "inspect" be noted at this point.

suspicion is found, that State Party[75] shall take appropriate measures[76] in accordance with relevant domestic and international law.[77, 78]

Article 7 ter
Safeguard clauses

1. Where a State Party takes measures against a vessel in accordance with article 7 *bis* of this Protocol, that State Party shall:[79]

(a) Ensure the safety[80] and humane treatment of the persons on board;

(b) Take due account of the need not to endanger the security of the vessel or its cargo;

(c) Take due account of the need not to prejudice the commercial or legal interests of the flag State or any other interested State;

(d) Ensure, within available means, that any measure taken with regard to the vessel is environmentally sound.

[*Paragraph 2 was deleted.*][81]

2. Where measures taken pursuant to this Protocol prove to be unfounded, the vessel shall be compensated for any loss or damage that may have been sustained, provided that the vessel has not committed any act justifying the measures taken.[82]

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[75] This proposal was made by the delegation of Australia at the informal consultations held during the ninth session of the Ad Hoc Committee.

[76] At the informal consultations held during the ninth session of the Ad Hoc Committee, it was noted that the words "measures" and "action" appeared interchangeably in this context throughout the Protocol. It was recommended that the term "measures" be used throughout and the Secretariat was requested to make the substitution, subject to subsequent approval by the Ad Hoc Committee. Other such substitutions were made in article 7 *bis*, paragraphs 2 (c), 3 and 5, and in article 7 *ter*, paragraphs 4 and 5.

[77] At the informal consultations held during the ninth session of the Ad Hoc Committee, it was recommended to amend this provision based on the proposal submitted by the United States (A/AC.254/L.195). The original language of this provision is derived from paragraph 16 of the IMO interim measures.

[78] At the sixth session of the Ad Hoc Committee, it was noted that the substance of this provision overlapped that of article 14, paragraph 13 (on appointment of central authorities for mutual legal assistance), of the draft Convention and should therefore be re-examined once that provision had been finalized.

[79] At the informal consultations held during the ninth session of the Ad Hoc Committee, there was lengthy discussion of former paragraphs 1 and 2 of this article as contained in document A/AC.254/4/Add.1/Rev.5. The consultations recommended replacement of those paragraphs with this text, based on the proposal of Australia. One delegation sought several further changes to the text to make the requirements of subparagraphs (b) and (c) more mandatory and to safeguard the commercial or legal interests of third parties that were not States. It proposed that the words "and relevant domestic and international law" be added after the word "Protocol"; that subparagraph (b) be replaced with the words "ensure that the security of the vessel or its cargo is not endangered"; that the words "take due account" in subparagraph (c) be replaced with the word "ensure"; and that the words "or third party" be added at the end of subparagraph (c).

[80] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations suggested inserting the phrase "of life at sea" after the word "safety".

[81] The informal consultations held during the ninth session of the Ad Hoc Committee recommended merging former paragraph 2 of this article with paragraph 1.

[82] This proposal was made by China at the sixth session of the Ad Hoc Committee. The text is taken from article 110, paragraph 3, of the United Nations Convention on the Law of the Sea. Note that references to "ship" in that text are replaced with "vessel" for consistency with the other provisions of the draft Protocol. References to unfounded "suspicions" in that text have been changed because there is no prior reference to

3. Any measure taken, adopted or implemented in accordance with this chapter shall take due account of the need not to interfere with or to affect:[83]

(a) The rights and obligations and the exercise of jurisdiction of coastal States in accordance with the international law of the sea; and

(b) The authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel.[84]

4. Any measure taken at sea pursuant to this chapter shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.[85]

5. No measures taken pursuant to this chapter shall be taken in the territorial sea, except with the permission of or as otherwise authorized by the coastal States.[86, 87]

[*Article 7 quater was deleted.*][88]

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suspicion in this article. At the informal consultations held during the ninth session of the Ad Hoc Committee, some concerns were expressed with respect to who might be able to claim compensation under this provision, from whom and in what forum. Concerns were also raised about the payment of compensation to "the vessel", as opposed to its owner or another party. It was decided to maintain consistency with the wording of the United Nations Convention on the Law of the Sea and no changes were recommended.

[83] At the informal consultations held during the ninth session of the Ad Hoc Committee, two delegations suggested replacing the words "shall take due account of the need not to interfere with" with the words "shall not interfere with".

[84] This text was proposed by the United States at the informal consultations held during the ninth session of the Ad Hoc Committee (A/AC.254/L.195), based on a proposal of the delegation of Singapore submitted to the sixth session of the Ad Hoc Committee (A/AC.254/4/Add.1/Rev.5, footnote 76) and article 17, paragraph 11, of the 1988 Convention.

[85] The language of this provision is derived from article 17, paragraph 10, of the 1988 Convention and from paragraph 20 of the IMO interim measures. The words "this chapter" were proposed by the United States at the informal consultations held during the ninth session of the Ad Hoc Committee (A/AC.254/L.195).

[86] The informal consultations held during the ninth session of the Ad Hoc Committee recommended the deletion of former paragraph 6 contained in A/AC.254/4/Add.1/Rev.5.

[87] Proposal by the United States at the informal consultations held during the ninth session of the Ad Hoc Committee (A/AC.254/L.195). The delegation of the Islamic Republic of Iran suggested deletion of the words "or as otherwise agreed by" and other delegations suggested ending the paragraph with the word "sea". Another delegation suggested deleting this paragraph. The word "action" was replaced with the words "measures" as requested for consistency with the revision of article 7 *bis*, paragraph 7. The delegation of Mexico agreed with the principle expressed in this paragraph, but voiced concerns about redundancy with the international law of the sea. It suggested that an interpretation note should be prepared and incorporated into the *travaux préparatoires*.

[88] The informal consultations held during the ninth session of the Ad Hoc Committee recommended the deletion of former article 7 *quater* and the consequent amendment of article 8, paragraph 2.

III. Cooperation, prevention and other measures[89]

[*Article 7 quinquiens*[90]
Measures for the protection of migrants

1. States Parties that have not yet done so shall adopt the necessary legislation or other measures to preserve the rights of migrants, as accorded under applicable international law, in particular the right to life, the principles of non-discrimination and non-refoulement and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.[91]

2. States Parties shall afford migrants effective protection against violence that may be inflicted upon them, whether by public officials or by private individuals, groups or institutions, by reason of having been smuggled.[92]

3. States Parties shall afford due assistance, as far as possible, to migrants whose life or safety has been endangered by reason of having been smuggled.[93]

4. At the time of any detention, migrants shall be informed of their right to the protection and assistance of the consular or diplomatic authorities of the State of which they are nationals.[94]]

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[89] There was a brief discussion at the sixth session of the Ad Hoc Committee about whether articles 8-11 were common with provisions of the draft Convention and, if so, whether they were needed in the draft Protocol itself. No changes were made to the text, but several new proposals were submitted for consideration. The delegation of Mexico proposed new text for articles 8-11 (A/AC.254/L.96). The delegation of Germany proposed to make the application of article 9 discretionary rather than mandatory (A/AC.254/L.97). The delegation of Argentina proposed a new chapter III for the draft Protocol, dealing with trafficking in migrants by land. It was decided that further discussion of these articles would be deferred until texts for the corresponding provisions of the draft Convention had been agreed to (A/AC.254/L.99).

[90] This merged proposal was made by the delegations of Mexico and Morocco based on earlier texts (see A/AC.254/5/Add.24). There was a general discussion of this proposal at the informal consultations held during the ninth session of the Ad Hoc Committee, which recommended that it be incorporated into chapter III of the Protocol for purposes of further discussion. Most delegations supported the objective of protecting migrants, but a number had concerns about specific elements of the proposed text. Delegations that supported the text cited the need to take positive measures to protect migrants and for an overall balance between the policies set out in the Protocol. Delegations that expressed concerns felt that some elements of the proposal overlapped with article 15 *bis*, but indicated a willingness to consider further changes to that provision based on this text and on the non-discrimination provision in article 13, paragraph 2, of the draft Trafficking in Persons Protocol (A/AC.254/4/Add.3/Rev.6). The informal consultations recommended that a discussion of specific elements of the proposal be resumed at the next session of the Ad Hoc Committee at which the draft Protocol was taken up and the Chairman asked delegations to use the intervening time to examine the text more carefully. The consultations recommended that the text appear in square brackets at this point in the draft Protocol, pending a decision about its final placement, should it be adopted.

[91] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations expressed concern that this provision overlapped with existing article 15 *bis*. Many delegations noted that the proposed text contained a positive obligation that was not found in article 15 *bis* and some supported it, while others opposed it for that reason.

[92] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations expressed concern about the reference to public officials in this paragraph. Several noted that matters of violent treatment were already the subject of domestic criminal law in all States.

[93] At the informal consultations held during the ninth session of the Ad Hoc Committee, most delegations indicated either support for or acceptance of this proposed paragraph.

[94] At the informal consultations held during the ninth session of the Ad Hoc Committee, some delegations expressed support for this proposal. Many noted that the right to consular assistance was already found in the Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of

Article 8

Compliance measures and arrangements

1. States Parties shall adopt every legislative and administrative measure needed in order to comply with the obligations deriving from this Protocol, having respect for the principles of sovereignty, territorial integrity and non-interference in internal affairs.

2. States Parties shall consider the conclusion of bilateral or regional agreements or operational arrangements[95] or understandings aimed at:

(a) Establishing the most appropriate and effective measures to prevent, combat and limit the illegal smuggling of migrants, in accordance with this Protocol; or

(b) Enhancing the provisions of this Protocol among themselves.

Article 9

Other legislative and administrative measures against smuggling of migrants by land, air or sea[96, 97]

1. States Parties shall take legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used in the commission of offences established under article 4 of this Protocol.[98]

2. Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.

3. States Parties shall take the necessary measures, in accordance with their domestic law, to provide for sanctions in cases of violation of the obligation set out in paragraph 2 of this article.[99]

1963. Some felt that this made its inclusion in this Protocol unnecessary, while others indicated that they could support its inclusion, provided that the wording matched that of the earlier instruments exactly.

[95] The addition of the words "or operational arrangements" was recommended by the informal consultations held during the ninth session of the Ad Hoc Committee following a recommendation to delete article 7 *quater*.

[96] At the informal consultations held during the ninth session of the Ad Hoc Committee, it was recommended that the words "by land, air and sea" be added to this title, as this would make it unnecessary to refer to them repeatedly in the text.

[97] The text of this article is based on the proposal of the European Community (A/AC.254/L.198), which was discussed extensively at the informal consultations held during the ninth session of the Ad Hoc Committee. At the informal consultations, it was recommended that former article 9 be deleted and that this be adopted as the replacement text. There was also discussion of the proposal of Argentina entitled "Trafficking in migrants by land" (see A/AC.254/5/Add.24), some elements of which were incorporated into new article 9. Argentina reserved the right to raise other elements of its proposal during future discussions of this article.

[98] Two delegations expressed concern about the obligatory nature of this paragraph (see also the draft Trafficking in Persons Protocol, article 8, paragraph 2, and the footnote to that paragraph).

[99] At the informal consultations held during the ninth session of the Ad Hoc Committee, several concerns about the new article were addressed. It was noted that the text required States Parties to impose an obligation on commercial carriers, which would require the carriers only to ascertain whether or not passengers had the necessary documents in their possession and not to make any judgement or assessment of the validity or authenticity of the documents. It was also noted that this text did not unduly limit the discretion of States Parties not to hold carriers liable for transporting undocumented refugees. Several other provisions either permitted or required States Parties not to curtail such transport. Article 15 *bis*, as formulated at present, preserved general international law obligations and referred specifically to the 1951 Convention and

Article 10
Information

1. States Parties shall take measures to ensure that they provide or strengthen information programmes to increase public awareness of the fact that the smuggling of migrants is a criminal activity frequently perpetrated by criminal organizations for profit and that it poses serious risks to the migrants involved.

2. Pursuant to article 22 of the Convention, States Parties shall cooperate in the field of public information for the purpose of preventing potential migrants from becoming victims of criminal organizations.

3. Without prejudice to articles 19 and 20 of the Convention, States Parties shall, for the purpose of achieving the objectives of this Protocol, exchange among themselves, in conformity with their respective domestic law and applicable treaties, agreements or arrangements, relevant information on matters such as:

(a) Embarkation and destination points, as well as routes, carriers and means of transportation, known to be or suspected of being used by criminal organizations engaged in the smuggling of migrants;

(b) The identity and methods of organizations or criminal associations known to be or suspected of being engaged in the smuggling of migrants;

(c) The authenticity and proper form of travel documents issued by a State Party and advice concerning the theft or related misuse of blank travel or identity documents;

(d) Means and methods of concealment and transportation of persons, the unlawful alteration, reproduction, acquisition or other misuse of travel or identity documents used in the smuggling of migrants and ways of detecting them;

(e) Legislative experiences, practices and measures to prevent, combat and eradicate the smuggling of migrants; and

(f) Relevant scientific and technological information useful to law enforcement, so as to enhance each other's ability to prevent, detect and investigate the smuggling of migrants and to prosecute those involved.

Article 11
Prevention

1. States Parties shall adopt such measures as may be necessary to detect and prevent the smuggling of migrants between their respective territories and that of other States Parties, by strengthening border controls, including by checking persons and travel or identity documents, and, where appropriate, by inspecting and seizing vehicles and vessels.

2. Without prejudice to article 19 of the Convention, States Parties shall consider intensifying cooperation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

1967 Protocol relating to the Status of Refugees. In most countries, domestic constitutional or legal provisions protecting migrants would also apply in such cases. With these explanations, the informal consultations recommended adoption of the new text.

Article 12
Security and control of documents[100]

States Parties shall adopt such measures as may be necessary, in accordance with available means:

(a) To ensure that travel or identity documents issued by them are of such quality that they cannot easily be misused and cannot readily be unlawfully altered, replicated, falsified or issued; and

(b) To ensure the integrity and security of travel or identity documents issued by or on behalf of the States Parties and to prevent their unlawful creation, issuance and use.

Article 13
Legitimacy and validity of documents

States Parties shall, upon request by other States Parties and in accordance with the domestic law of the requested State Party, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in the name of the requested State Party and suspected of being used in the smuggling of migrants.

Article 14
Training

1. States Parties shall provide or strengthen specialized training for immigration and other relevant officials in preventing the smuggling of migrants and in treating smuggled migrants.

2. States Parties shall cooperate with each other and with competent international organizations, as appropriate, to ensure that there is adequate personnel training in their territories to prevent, combat and eradicate the smuggling of migrants and to protect the rights of victims of such [smuggling] [trafficking] and illegal transport. Such training shall include, *inter alia*:

(a) Improving the security and quality of travel documents;

(b) Recognizing and detecting fraudulent travel or identity documents;

(c) Gathering criminal intelligence, relating in particular to the identification of organizations or criminal associations known to be or suspected of being engaged in the smuggling of migrants, the methods used to transport smuggled migrants, the misuse of travel or identity documents for smuggling migrants and the means of concealment used in the smuggling of migrants;

(d) Improving procedures for searching for and detecting, at conventional and non-conventional points of entry and exit, concealed, undocumented or improperly documented persons; and

(e) Recognizing the need to provide humane treatment to and protect the human rights of migrants.

[100] Articles 12 and 13 result from the work of an informal drafting group that met during the sixth session of the Ad Hoc Committee. The revised texts were discussed at the informal consultations held during the ninth session of the Ad Hoc Committee, which recommended that they be adopted. It was noted that they corresponded to articles 9 and 9 *bis* of the draft Trafficking in Persons Protocol.

3. States Parties shall make every effort to provide the necessary resources, such as vehicles, computer systems and document readers, to combat the smuggling of migrants. States Parties with relevant expertise should consider providing technical assistance to States that are frequently used as States of origin or as transit States for the smuggling of migrants.

[*Article 15*
Return of smuggled migrants[101]

1. Each State Party agrees to facilitate and accept, without delay, the return of a person who has been smuggled contrary to the terms of this Protocol who is a national of that State Party or who had the right of abode in the territory of that State Party at the time of entry into the receiving State.

2. At the request of the receiving State Party, States Parties shall, without undue or unreasonable delay, verify whether a person who has been smuggled contrary to the terms of this Protocol is a national of the requested State Party.

3. In order to facilitate the return of a person smuggled contrary to the terms of this Protocol without proper documentation, the State Party of whom the person is a national or in which the person had the right of abode at the time of entry into the receiving State shall agree to issue, at the request of the receiving State Party, such travel documents or other authorization as may be necessary to enable the person's readmission into its territory.]

Article 15 bis
Saving clause

Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.[102, 103]

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[101] At the sixth session of the Ad Hoc Committee, a majority of delegations supported retaining this article, subject to further discussion. Amendments were proposed by the delegations of France (case-by-case implementation), the Philippines (new paragraph emphasizing the rights of migrants and their status as victims) and Ukraine (limitation of paragraph 1 to persons who were nationals or had a right of permanent abode in the source country), but there was no general agreement in support of any of these proposals. Substantively, some delegations expressed the view that making provision for the return of migrants was necessary as a means of deterring migrants and organized criminal groups and was necessary to ensure the right of the migrants themselves to return to their place of origin. Other delegations proposed either deletion or modification on the basis that the provision was beyond the mandate given to the Ad Hoc Committee by the General Assembly and that it unfairly placed the burden on the migrants themselves. One suggested compromise was that the provision might be retained, but with language that would ensure that migrants could only be returned voluntarily and that their rights of due process were protected. The Chairperson invited delegations to work unofficially on new text, which would have only the status of a proposal from one or more sponsoring delegations at a future session.

[102] At the eighth session of the Ad Hoc Committee, it was decided to replace the previous text of article 5, paragraph 2, with new text based on the proposal of Belgium and Norway (A/AC.254/L.189) and article 13 of the revised draft Trafficking in Persons Protocol (A/AC.254/4/Add.3/Rev.5), as agreed at the seventh session. It was also decided to place the text here for greater consistency with the text of the Trafficking in Persons Protocol. Some delegations expressed concern about the inclusion of the words "and the principle of non-refoulement as contained therein". In their view this was redundant vis-à-vis the international instruments cited in the new article, which also contained principles of non-refoulement. One delegation also felt that the

IV. Final provisions

Article 16
Implementation[104]

1. For the purpose of examining the progress made by the States Parties in achieving the implementation of the obligations undertaken in this Protocol, States Parties shall provide periodic reports to the Conference of the Parties to the Convention.

2. States Parties shall provide such reports together with the reports submitted in accordance with article 23 of the Convention.

Article 17
Settlement of disputes[105, 106]

1. States Parties shall endeavour to settle disputes concerning the interpretation or application of this Protocol through negotiation.

2. Any dispute between two or more States Parties concerning the interpretation or application of this Protocol that cannot be settled through negotiation within a reasonable time shall, at the request of one of those States Parties, be submitted to arbitration. If, six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any one of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.

3. Each State Party may, at the time of signature, ratification, acceptance or approval of or accession to this Protocol, declare that it does not consider itself bound by

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reference to a specific principle of international law could lead to the interpretation that other established principles might not apply. One delegation noted that text dealing with "principles of non-discrimination" appeared in the original proposal of Belgium and Norway and in article 13 of the Trafficking in Persons Protocol and wondered whether they should be included in this provision as well. The discussions on this provision also considered proposals of Mexico (A/AC.254/L.160) and Morocco (see A/AC.254/5/Add.21). The text of those proposals was not adopted, but may be relevant to other provisions and the delegations of Mexico and Morocco reserved the right to raise their proposals again at the appropriate time.

[103] At the eighth session of the Ad Hoc Committee, some delegations expressed concern about the implications of this provision for States that were not parties to the instruments referred to. In particular, the delegations of Saudi Arabia and the United Arab Emirates were concerned that, as a result of this wording, their Governments might be subject to obligations under those instruments, to which they were not parties, should they become parties to the Convention and the Protocol. It was pointed out that the opening words protected the integrity of existing obligations, but could not be interpreted as creating new ones. Thus, a State that was not already subject to such an obligation would not become subject to it simply by becoming a party to the Protocol. The delegations of Saudi Arabia and the United Arab Emirates asked that this fact be noted in the *travaux préparatoires*.

[104] One delegation proposed the deletion of this article because the issue of implementation and reporting requirements would be covered by the Convention.

[105] The text of articles 17-22 is identical to the text of the corresponding provisions of the Convention and is reproduced here in accordance with a decision taken by the Ad Hoc Committee at its sixth session (A/AC.254/23). Only necessary editorial changes have been made to the text.

[106] At the sixth session of the Ad Hoc Committee, it was agreed that various provisions, including article 5, paragraph 2 (now deleted), and portions of article 7 *ter*, would be revised and added to the final provisions as a "saving clause" applicable to the entire Protocol. Details of the text were deferred pending discussion of the final provisions.

paragraph 2 of this article. The other States Parties shall not be bound by paragraph 2 of this article with respect to any State Party that has made such a reservation.

4. Any State Party that has made a reservation in accordance with paragraph 3 of this article may at any time withdraw that reservation by notification to the Secretary-General of the United Nations.

Article 18

Signature, ratification, acceptance, approval and accession

1. This Protocol shall be open to all States for signature from 12 to 15 December 2000 in Palermo, Italy, and thereafter at United Nations Headquarters in New York until 12 December 2002.

2. This Protocol shall also be open for signature by regional economic integration organizations provided that at least one member State of such organization has signed this Protocol in accordance with paragraph 1 of this article.

3. This Protocol is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary-General of the United Nations. A regional economic integration organization may deposit its instrument of ratification, acceptance or approval if at least one of its member States has done likewise. In that instrument of ratification, acceptance or approval, such organization shall declare the extent of its competence with respect to the matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

4. This Protocol is open for accession by any State or any regional economic integration organization of which at least one member State is a Party to this Protocol. Instruments of accession shall be deposited with the Secretary-General of the United Nations. At the time of its accession, a regional economic integration organization shall declare the extent of its competence with respect to matters governed by this Protocol. Such organization shall also inform the depositary of any relevant modification in the extent of its competence.

Article 19

Entry into force

1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the fortieth instrument of ratification, acceptance, approval or accession. For the purpose of this paragraph, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.

2. For each State or regional economic integration organization ratifying, accepting, approving or acceding to this Protocol after the deposit of the fortieth instrument of such action, this Protocol shall enter into force on the thirtieth day after the date of deposit by such State or organization of the relevant instrument.

Article 20
Amendment

1. After the expiry of five years from the entry into force of this Protocol, a State Party may propose an amendment and file it with the Secretary-General of the United Nations, who shall thereupon communicate the proposed amendment to the States Parties and to the Conference of the Parties to the Convention for the purpose of considering and deciding on the proposal. The Conference of the Parties shall make every effort to achieve consensus on each amendment. If all efforts at consensus have been exhausted and no agreement has been reached, the amendment shall, as a last resort, require for its adoption a two-thirds majority vote of the States Parties present and voting at the meeting of the Conference of the Parties.

2. Regional economic integration organizations, in matters within their competence, shall exercise their right to vote under this article with a number of votes equal to the number of their member States that are Parties to this Protocol. Such organizations shall not exercise their right to vote if their member States exercise theirs and vice versa.

3. An amendment adopted in accordance with paragraph 1 of this article is subject to ratification, acceptance or approval by States Parties.

4. An amendment adopted in accordance with paragraph 1 of this article shall enter into force in respect of a State Party ninety days after the date of the deposit with the Secretary-General of the United Nations of an instrument of ratification, acceptance or approval of such amendment.

5. When an amendment enters into force, it shall be binding on those States Parties which have expressed their consent to be bound by it. Other States Parties shall still be bound by the provisions of this Protocol and any earlier amendments that they have ratified, accepted or approved.

Article 21
Denunciation

1. A State Party may denounce this Protocol by written notification to the Secretary-General of the United Nations. Such denunciation shall become effective one year after the date of receipt of the notification by the Secretary-General.

2. A regional economic integration organization shall cease to be a Party to this Protocol when all of its member States have denounced it.

Article 22
Depositary and languages

1. The Secretary-General of the United Nations is designated depositary of this Protocol.

2. The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned plenipotentiaries, being duly authorized thereto by their respective Governments, have signed this Protocol.